

Exhibit 3

Part 2

Wagner could amend to allege that: 1) the spams and the *OnDemand Research.com* website include references to “completing sponsor offers” such as buying or signing up for commercial offers, and 2) in addition to taking a survey, a person must also give Spire Vision demographic and behavioral data.

D. Wagner’s Cause of Action For B&P Code § 17529.5 is Not Preempted by the CAN-SPAM Act

Spammers frequently argue that the federal CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*, preempts California’s anti-spam law except for common-law fraud. Spammers do not have an inherent interest in the doctrine of preemption, but they always argue preemption because the CAN-SPAM Act does not let spam recipients (consumers or businesses) sue. 15 U.S.C. § 7706. In other words, spammers seek to avoid plaintiffs’ arguments on the merits by stopping plaintiffs on the basis of standing.

Relying exclusively on *federal* cases from the Ninth and Fourth Circuits, Defendants claim that the federal CAN-SPAM Act preempts state anti-spam laws (such as B&P Code § 17529.5) except for claims of common-law fraud. Defendants may wish that spam recipients had to meet the heightened pleading standard associated with fraud, but there is no authority for this proposition in the case law or in the plain language of the CAN-SPAM Act’s exception to preemption provision, which refers to *falsity or deception* in (b)(1), not *fraud*.

(1) In general. This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except* to the extent that any such statute, regulation, or rule prohibits *falsity or deception* in any portion of a commercial electronic mail message or information attached thereto.

(2) State law not specific to electronic mail. This Act shall not be construed to preempt the applicability of—

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of *fraud* or computer crime.

15 U.S.C. § 7707(b) (emphasis added).

Spire Vision’s claim that “As Wagner’s attorneys – Daniel Balsam and Timothy Walton – well know, the CAN-SPAM Act explicitly preempts all complaints about unsolicited commercial email that do not allege fraud or damages,” Demurrer at 1:22-23 – a claim based on a single unpublished ruling in a federal case that it not even final – is false. Balsam and Walton know nothing of the sort; in fact, they obtained a ruling from a California Court of Appeal that B&P Code § 17529.5 is *not* preempted. Balsam Decl. at ¶ 7.

I. Congress Preempted State Anti-Spam Laws Only as to Truthful Spams

In the interest of creating a national uniform standard for commercial email, Congress chose to exclusively occupy the field of *truthful* commercial email. But Congress deliberately limited the scope of federal preemption, expressly authorizing the states to define and regulate *false or deceptive* spam. 15 U.S.C. § 7707(b)(1). “If Congress had intended to completely displace all state regulation of commercial email, it certainly could have done so in CAN-SPAM. It could have provided for no exceptions. But, it did not do so.”

1 *Free Speech Coalition Inc. v. Shurtleff*, No. 2:05CV949DAK, 2007 U.S. Dist. LEXIS 21556 at *29-30 (D.
2 Utah Mar. 23, 2007) (order on motions to dismiss, to strike, and for preliminary injunction).

3 **2. *The Exception to Preemption Cannot Depend on Common-Law Fraud, Because Such Claims***
4 ***Were Never Preempted in the First Place***

5 The preemption clause at issue deals only with *positive enactments* (“statute, regulation or rule”), not
6 common law. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002). The CAN-SPAM Act preempts
7 certain positive enactments and then saves a subcategory of those laws. 15 U.S.C. § 7707(b)(1). Thus, there is
8 no need to “save” common-law fraud claims, because *they were never preempted in the first place*. To give the
9 savings clause meaning, it should be interpreted to cover state laws prohibiting falsity or deception *other* than
10 common-law claims. *Asis Internet Services v. VistaPrint USA Inc.*, 617 F. Supp. 2d 982, 993 (N.D. Cal. 2009)
11 (order re: motion to dismiss). Significantly, Congress did not use the word “fraud” to describe these saved
12 claims, but rather “falsity,” a word with a well-known legal meaning, broader than common-law fraud.

13 **3. *“Falsity” Does Not Mean “Fraud,” and “Deception” Does Not Mean “Fraud”***

14 Congress’ Use of “Falsity” and “Fraud” So Close Together Indicates that Congress Meant Two
15 Different Things. Congress used the words “falsity or deception” in the exception to preemption provision
16 applicable to state laws regulating email, 15 U.S.C. § 7707(b)(1), but used the word “fraud” immediately
17 afterwards in § 7707(b)(2)(B) to address laws not specific to email. Different terms, so close together, indicate
18 that Congress did *not* intend that state anti-spam laws survive federal preemption only when a plaintiff alleges
19 common-law fraud (i.e., reliance and actual damages). *See e.g. Asis Internet Services v. ConsumerBargain*
20 *Giveaways LLC et al*, 622 F. Supp. 2d 935, 942 (N.D. Cal. 2009) (order re Rule 12 motion). *If* Congress had
21 intended (b)(1) to mean *fraud*, then (b)(1) would be superfluous, because it would be subsumed by (b)(2)(B).

22 The Disjunctive “Or” Demonstrates that the Exception to Preemption Cannot Depend on Fraud. As the
23 Senate Report accompanying the CAN-SPAM Act explained, in the interest of creating a national standard for
24 truthful commercial email,

25 The legislation would preempt State and local statutes, regulations, and rules that expressly
26 regulate the use of e-mail to send commercial messages except for statutes, regulations, or rules
27 that target fraud *or deception* in such e-mail. Thus, a State law requiring some or all
28 commercial e-mail to carry specific types of labels, or to follow a certain format or contain
specified content, would be preempted. By contrast, a state law prohibiting fraudulent *or*
deceptive headers, subject lines, or content in a commercial e-mail would not be preempted.

29 Senate Report No. 108-102 at *21 (2003) (emphasis added). The repeated use of “*or deceptive*” confirms that:
30 1) *deception* cannot mean *fraud*, for if it did, then the phrase “fraudulent or deceptive” itself would be
31 redundant, and 2) Congress did not intend that the exception-to-preemption depends *only* upon a finding of
32 fraud; deception is sufficient to avoid preemption.

Congress was Aware of State Anti-Spam Laws Prohibiting “False” Spams When it Enacted the CAN-SPAM Act, and Chose Not to Use “Fraud” in the Exception to Preemption Provision. *Hoang v. Reunion.com Inc.* noted that Congress was aware that many states prohibited false and deceptive spams *without* requiring reliance or actual damages, and still chose to preempt state anti-spam laws except for *falsity*, not fraud.

A review of the state laws in effect at the time Congress enacted CAN-SPAM provides further support for the above-discussed interpretation of CAN-SPAM’s preemption provision. Historically, many states have enacted consumer protection laws prohibiting the dissemination of false or misleading statements made in connection with the advertising of products or services, and *have not required the plaintiff to prove actual reliance on the false or misleading statement*, but, rather, to prove that the false or misleading statement is, objectively, the type of statement likely to deceive a reasonable consumer. . . .

Consequently, this Court will presume Congress was aware of such [state] statutes [already in effect prior to the CAN-SPAM Act] and the absence of any language therein requiring a showing of actual reliance, and finds the legislative history identified in *Gordon* . . . is properly understood as exempting from preemption statutes such as § 17529.5. . . .

No. C-08-3518 MMC, 2010 U.S. Dist. LEXIS 34466 at *17-19 (N.D. Cal. Mar. 31, 2010) (emphasis added). *Hypertouch* came to the same conclusion. 192 Cal. App. 4th at 828. Thus, if Congress really wanted to preempt state laws except for *fraud*, it could have simply used the word “fraud” in the exception to preemption provision. But it did not do so.

4. California Law Distinguishes “Deceit” and “Fraudulent Deceit”

Even if Congress meant *fraud* instead of *falsity*, Congress cannot write laws for the states. It is well established under California law that in the context of Business & Professions Code § 17500 actions, “fraud” does not mean the traditional common law tort (including reliance), but rather the *likelihood of deception*. “Allegations of actual deception, reasonable reliance, and damage are unnecessary.” *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1st Dist. 1998). And,

The evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance upon a false statement knowingly made, as in a common law action in deceit.

Ford Dealers Assoc. v. Dept. of Motor Vehicles, 32 Cal. 3d 347, 359 (1982).

Additionally, under California law, “deception” does not mean “fraud.” Civil Code § 1710 defines “deceit” and § 1709 defines “fraudulent deceit” Not only is there no mention of reliance in Section 1710’s definition of “deceit,” but the fact that there are *separate* code sections for “deceit” and “fraudulent deceit” indicates that “deceit” on its own does *not* require the elements of common-law fraud, including reliance.

5. Preemption is Disfavored, Especially as to Areas Traditionally Regulated by States

As the U.S. Supreme Court has held, “[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted). And, “Where . . . the field which Congress is said to have

pre-empted includes areas that have ‘been traditionally occupied by the States,’ congressional intent to supersede state laws must be ‘clear and manifest.’” *Jevne v. Superior Court*, 35 Cal. 4th 935, 949 (2005). Advertising is traditionally an area of state regulation.

[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has “legislated ... in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” We apply this presumption to the *existence* as well as the *scope* of preemption. . . . There can be no doubt that the presumption applies with particular force here. As the Court of Appeal acknowledged here, “[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states’ historic police powers and therefore are subject to the presumption against preemption.”

Farm Raised Salmon Cases, 42 Cal. 4th 1077, 1088 (2008). Therefore, there is a presumption *against* preemption of laws prohibiting deceptive advertising... laws such as B&P Code § 17529.5.

6. *Omega World Travel v. Mummagraphics is Distinguishable on the Facts and Does Not Stand for the Proposition of Preemption Except for Fraud*

Defendants cite *Omega World Travel Inc. v. Mummagraphics*, 469 F.3d. 348 (4th Cir. 2006), addressing preemption of Oklahoma’s anti-spam law, to support their position. But in the *Omega* spams, the only alleged falsity was immaterial technical errors that most email users would never see, arising from a software configuration error. The *Omega* opinion repeatedly referred to “immaterial error,” “immaterial misrepresentations,” “bare error,” and “an isolated error,” and the court noted that state laws providing a cause of action for “bare error” in commercial email would frustrate Congress’ goal of a “national standard.” *Id.* at 353-55, 359. There were no allegations that the *Omega* spams had misleading Subject Lines, misrepresented From Names, or misleading and untraceable domain name registrations, as Wagner alleges here. Unlike the instant spams, which Spire Vision sent from domain names registered to untraceable random word pairings and boxes at The UPS Store in other states, “The [Omega] e-mails at issue were chock full of methods to ‘identify, locate, or respond to’ the sender or to ‘investigate [an] alleged violation’ of the CAN-SPAM Act.” *Id.* at 357.

Omega does *not* state that the CAN-SPAM Act categorically preempts all state anti-spam laws except for common-law fraud. The *Omega* court only considered the claims of a particular plaintiff suing under Oklahoma law, and found that *his* claims were preempted because they were based on immaterial falsity and technical error. *Id.* at 353-55, 359. In fact, *Omega*’s facts and holding are so narrow that the District Court in Maryland – *part of the Fourth Circuit* – did not follow *Omega* when it held that CAN-SPAM did *not* preempt Maryland’s anti-spam law. *Beyond Systems v. Keynetics Inc.*, No. PJM 04-686 (D. Md. Mar. 26, 2007) (order denying defendant’s motion for other relief under FRCP 7 and second renewed motion to dismiss for lack of personal jurisdiction). Thus, *Omega* cannot have general applicability.

1 **7. *Gordon v. Virtumundo is Distinguishable and Does Not Support the Assertion that the CAN-***
 2 ***SPAM Act Preempts State Laws Except for Fraud***

3 Wagner does not disagree with the Ninth Circuit’s holding in *Gordon*. In fact, Wagner embraces
 4 *Gordon*, noting that three out of four post-*Gordon* rulings in the Northern District of California and – far more
 5 importantly – two out of two rulings in California Courts of Appeal confirm that the exception to preemption is
 6 based on *falsity*, without requiring a plaintiff to plead reliance and damages.

7 To the extent that Ninth Circuit authority may be persuasive, Wagner notes that Defendants quote
 8 *Gordon* incompletely and out of context. The court said that “the siren song of substantial statutory damages
 9 would entice opportunistic plaintiffs to join the fray, which would lead to undesirable results,” Demurrer at 5:9-
 10 11, but the very next sentence, which Defendants conveniently omitted from their Demurrer, reads:

11 While Congress did not intend that standing be limited to fee-for-service [Internet Service
 12 Provider] operations, we think it did intend to exclude plaintiffs who, despite certain identifying
 13 characteristics, did not provide the actual, *bona fide* service of a legitimate operation.
 14 575 F.3d at 1050. Thus, the “opportunistic plaintiffs” to whom the court referred were really individuals with
 15 unclean hands, pretending to be Internet Service Providers, who were actively seeking spam. The Ninth Circuit
 16 found that Jim Gordon was not a true ISP. Gordon and his “clients” deliberately set up “spam traps” and opted
 17 in to various online promotions. Gordon would then threaten various advertisers with anti-spam lawsuits on
 18 behalf of friends and family members who had abandoned their email accounts. Gordon admitted to operating
 19 an anti-spam business; he had had no employment or income for at least five years, other than settlements from
 20 anti-spam litigation. Gordon sued Virtumundo and others under the federal CAN-SPAM Act and several
 21 *Washington* laws, seeking several million dollars. *Id.* at 1045-46, 1049, 1056.

22 In sharp contrast, Wagner has a real job, never claimed to be an ISP, and never sued (or threatened to
 23 sue) under the CAN-SPAM Act. Wagner never sought to receive spam for profit or any other motive. Wagner
 24 never gave direct consent to receive commercial email to any of the Defendants. Wagner received the spams at
 25 issue at an email address that he uses every day, not an “abandoned” email address. Wagner Decl. at ¶ 3.

26 Moreover, Defendants attempt to mislead this Court as to what *Gordon* really says. The Ninth Circuit
 27 did *not* unequivocally hold that CAN-SPAM preempts all state law claims except those arising from
 28 “traditional tort theories such as claims arising from fraud or deception.” Demurrer at 6:19-21. Defendants
 29 draw an overbroad conclusion from that sentence fragment. In fact, *Gordon* states that “Congress carved out
 30 from preemption state laws that proscribe ‘falsity or deception’ in commercial e-mail communications” and
 31 that “Congress did not intend that states retain unfettered freedom to create liability for *immaterial* inaccuracies
 32 or omissions.” 575 F.3d at 1061-62 (emphasis added). Here, Wagner alleges material falsity and deception –
 33 he could not identify anyone from the generic From Names, or from the domain names that Spire Vision
 registered to untraceable random word pairings and boxes at The UPS Store. Wagner Decl. at ¶ 2.

1 Additionally, *Asis Internet Services v. SubscriberBase Inc.* pointed out that Jim Gordon's claims were
 2 preempted *not* because he did not allege reliance and damages, but rather because Washington's anti-spam law
 3 was too broad and "purport[ed] to regulate a vast array of *non*-deceptive acts and practices." No. 09-3503 SC,
 4 2010 U.S. Dist. LEXIS 33645 at *31-32 (N.D. Cal. Apr. 1, 2010). Therefore, *Gordon* has little relevance to this
 5 Action because the Ninth Circuit found that *Washington's* anti-spam law was preempted because it was overly
 6 broad, prohibiting even "truthful spam." But *California's* anti-spam law has a standalone subsection,
 7 § 17529.5, that is expressly limited to falsified, misrepresented, forged, and misleading spam. Therefore, B&P
 8 Code § 17529.5 fits squarely within the exception to preemption set forth in 15 U.S.C. § 7707(b)(1).

9 **8. *The Majority of Post-Gordon Cases in the Northern District of California Confirm That the***
 10 ***Exception to Preemption is Based on Falsity, not Fraud***

11 To the extent that the federal courts are persuasive to this California proceeding, Wagner points out that
 12 most Northern District rulings before *Gordon*, and – more importantly – three out of four *after Gordon*, ruled
 13 that the exception to preemption does *not* require pleading reliance and damages.

14 Wagner could quote at length from *ConsumerBargainGiveaways, VistaPrint USA, Asis Internet*
 15 *Services v. SubscriberBase Inc.*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852 (N. D. Cal. Dec. 4, 2009)
 16 and 2010 U.S. Dist. LEXIS 33645 (N.D. Cal. Apr. 1, 2010); and *Asis Internet Services v. Member Source*
 17 *Media LLC*, No. C-08-1321 EMC, 2010 U.S. Dist. LEXIS 47865 (N.D. Cal. Apr. 20, 2010), all of which
 18 carefully analyzed the text and structure of the CAN-SPAM Act's exception to preemption provision, and
 19 concluded that allegations of falsity and deception are sufficient to avoid preemption; actual reliance and
 20 damages are not required.

21 Wagner would call attention in particular to *Hoang v. Reunion.com*, in which the court *initially* granted
 22 Reunion.com's motion to dismiss on preemption grounds because Hoang did not allege common-law fraud
 23 (i.e., reliance and actual damages). No. C-08-3518 MMC, 2008 U.S. Dist. LEXIS 103659 (N.D. Cal. Dec. 23,
 24 2008). But *after and in direct response* to *Gordon*, the judge *reversed herself* on Hoang's motion for
 25 reconsideration, ruling that "plaintiffs' failure to allege they relied to their detrimental [sic] on the alleged false
 26 statements in defendant's e-mails does not constitute a ground for dismissal of their claims." 2010 U.S. Dist.
 27 LEXIS 34466 (N.D. Cal. Mar. 31, 2010) at *21.

28 Defendants over-rely on *one* contrary ruling, a recent unpublished order in a declaratory relief action
 29 that held that the spam recipient's counter-claims are preempted. *Davison Design & Development, Inc. v.*
 30 *Riley*, No. 4:11-cv-02970 (PJH), 2012 U.S. Dist. LEXIS 131087 (N.D. Cal. Sept. 13, 2012). Demurer at 5:19-
 31 6:17. However, the legal analysis in *Davison* is scant compared to the three other post-*Gordon* rulings, the case
 32 is still being litigated, and Wagner is informed that Riley plans to appeal. Wagner Decl. at ¶ 4.
 33

1 **9. California Cases Hypertouch and Balsam Hold that B&P Code § 17529.5 is Not Preempted**

2 In *Hypertouch*, the Court of Appeal of the Second District thoroughly analyzed the statutory language
3 and reviewed the California and federal case law as to the issue of CAN-SPAM preemption of state laws,
4 including *Omega* and *Gordon*, and held that B&P Code § 17529.5 is *not* preempted.

5 The trial court concluded that the CAN-SPAM Act's savings clause, which permits states to
6 regulate “falsity or deception” in a commercial e-mail, only applies to state statutes that require
7 the plaintiff to establish every element of common law fraud. For the reasons that follow, we
8 disagree with the trial court’s interpretation of the CAN-SPAM Act and hold that *the federal*
9 *statute does not preempt state laws claims arising under section 17529.5.*

10 Neither [*Gordon*] nor *Omega* decided the issue presented here: whether a state law that targets
11 commercial e-mails containing deceptive content is preempted by the CAN-SPAM Act
12 because it does not require the plaintiff to establish all elements of a traditional fraud claim. . . .

13 California’s decision to remove the elements of common law fraud does not affect the type of
14 statement that might subject a defendant to liability and, as a result, [*Gordon’s*] and *Omega’s*
15 analyses are of limited relevance.

16 The CAN-SPAM Act’s savings clause applies to any state law that prohibits material falsity or
17 material deception in a commercial e-mail regardless of whether such laws require the plaintiff
18 to prove and plead each and every element of common law fraud.

19 *Id.* at 825, 832-33 (emphasis added).

20 The Court of Appeal of the First District ruled identically: “We find the reasoning of *Hypertouch*
21 persuasive on this [preemption] issue, and adopt it here.” *Balsam*, 203 Cal. App. 4th at 1102.

22 Defendants’ statement that “Neither *Balsam* nor *Hypertouch* reconcile the vast judicial and statutory
23 authority that only state laws that codify ‘traditional tort theories’ survive preemption,” Demurrer at 11:13-14,
24 is but wishful thinking, as both courts went into considerable detail as to precisely why their rulings are
25 consistent with *Gordon*, namely, because *Gordon* did *not* hold that state anti-spam laws are preempted except
26 for common-law fraud. Nor do Defendants identify what comprises their “vast” authority. Defendants
27 presented only a Fourth Circuit case (*Omega*) and a Ninth Circuit case (*Gordon*), neither of which actually
28 stands for the proposition of categorical preemption except for common law fraud, and a single Northern
29 District case (*Davison*) that misapplied *Gordon* and which the spam recipient intends to appeal. Defendants
30 did not present *any* California cases in their “vast” set of authority that support their position.

31 Defendants’ suggestion that *Hypertouch* and *Balsam* are not persuasive, Demurrer at 11:15-16, is not
32 only incorrect, but it actually does not go far enough. *Hypertouch* and *Balsam* are not only persuasive
33 authorities, they are in fact *binding* authorities. Unlike, say, *Omega*, *Gordon*, and *Davison*.

34 **E. Wagner Does Not Need to Prove Common Law Fraud or Deceit**

35 Defendants are correct that Wagner did not allege facts supporting all the elements of common law
36 fraud or deception. Demurrer at 8:13-14. But he does not have to. *Hypertouch* and *Balsam*, *supra*.

Defendants misstate Wagner's position when they claim that "The only misrepresentations Wagner alleges involve his belief that the email header information should have been more specific." Demurrer at 8:23-24. The issue is not *specificity*, but rather that the From Names completely fail to identify who the spams are *from, supra*. Wagner also alleges untraceable domain names and false and misleading Subject Lines.

Whether or not *Wagner* was personally misled is irrelevant, Demurrer at 9:12, as B&P Code § 17529.5 expressly sets forth an objective, "reasonable person" standard. Wagner properly pled violations of the statute.

F. Wagner Was Harmed by Defendants' Unlawful Spams

Although Defendants baldly claim that Wagner was not harmed by receiving their spams, the California Legislature stated in no uncertain terms that recipients of spam *are* harmed. *See* B&P Code § 17529(d), (e), (g), and (h). *See also Ferguson v. FriendFinders Inc.*, 94 Cal. App. 4th 1255, 1268 (1st Dist. 2002) (referring to the "harmful effects of deceptive spam).

Congress did *not* state that only ISPs or government agencies are likely to be harmed by spam, as Defendants suggest. Demurrer at 5:12-14. In fact, the CAN-SPAM Act, upon which Defendants rely heavily in their Demurrer, even acknowledges that spam recipients *are* harmed.

The receipt of unsolicited commercial electronic mail may result in *costs to recipients* who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for *the time spent* accessing, reviewing, and discarding such mail, or for both. 15 U.S.C. § 7701(a)(3) (emphasis added). And in *Gordon*, upon which Defendants also heavily rely, the Ninth Circuit recognized "the *harmful effects* spam and spamming practices, both lawful and unlawful, have upon businesses *and consumers*." 575 F.3d at 1057 (emphasis added).

Spire Vision attempts to minimize the scope of its unlawful actions by arguing that the 49 spams Wagner received is only a "handful," Demurrer at 5:15, but the fact that the Legislature enacted B&P Code § 17529.5 in the first place, including the liquidated damages provision, fatally undermines Spire Vision's claim that Wagner's decision to exercise his statutory rights² is somehow a "vast overreaction." Demurrer at 10:6. Regardless, Wagner alleged he was harmed, Verified Complaint at ¶¶ 6, 46, 48, 151, which Defendants must accept as true for purposes of their Demurrer.

G. California Courts Will Award Liquidated Damages of \$1,000 Per Unlawful Spam

Civil Code § 3533 states that "The law disregards trifles," Demurrer at 9:18, but Wagner's claims and the spam problem perpetuated by Defendants are not trifling. Wagner submits that the more relevant maxim of

² Defendants complain that Wagner "did not negotiate or even make a demand. He proceeded straight to litigation []." Demurrer at 10:6-7. Defendants fail to mention that the last time Balsam made a demand of Spire Vision, Spire Vision and one of its clients sued Balsam's client for a declaratory judgment. *Davison, supra*. Accordingly, any attempt to negotiate here would have been futile. Wagner decided he would rather be a plaintiff than a defendant, and initiated this Action. Balsam Decl. at ¶ 8, Wagner Decl. at ¶ 5.

jurisprudence is Civil Code § 3523: "For every wrong there is a remedy." Conveniently, the Legislature stated exactly the remedy a spam recipient can claim: \$1,000 per spam. B&P Code § 17529.5(b)(1)(B)(ii).

Again relying on a federal case, *Hoang (2008)*, Defendants meritlessly claim that the harm Wagner suffered is insufficient under California law. Demurrer at 10:10. Unbelievably, Defendants also claim that "California Courts will not award damages to plaintiffs [such as Wagner] whose harm is inconsequential." Demurrer at 9:19-20. Defendants' claim is false on its face; as Spire Vision and its attorneys well know, in *Balsam*, the trial court awarded the plaintiff \$1,000 in liquidated damages for each of seven unlawful spams and \$81,900 for attorneys' fees, and the Court of Appeal affirmed. 203 Cal. App. 4th at 1093, 1103, 1105.

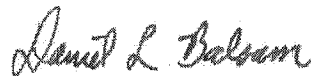
V. WAGNER'S CLAIMS UNDER B&P CODE § 17538.5 ARE MERITORIOUS

Defendants claim that B&P Code § 17538.5 "allows a private citizen to pursue only an action for an injunction, not an action for penalties," Demurrer at 13:18-19, relying on *Chern v. Bank of America*, 15 Cal.3d 866 (1976). But *Chern* addressed a bank's false statements as to calculating interest, in violation of B&P Code § 17500. Section 17538.5 was not at issue. Defendants also claim that B&P Code § 17538.5 "requires any private citizen to demonstrate that he has 'suffered injury in fact and has lost money or property as a result of a violation of this chapter,'" Demurrer at 13:20-21 (emphasis in original), but nothing in the statute says anything of the sort. Wagner maintains that he is entitled to recover the civil fines set forth in B&P Code § 17538.5(a), because the spams failed to disclose the legal name under which Spire Vision, as the sender of the spams, does business and the complete street address from which Spire Vision actually conducted business, and Wagner was harmed by receiving the spams.

VI. CONCLUSION

Defendants are not permitted to file a Demurrer now that this Action has been remanded, because they filed Answers while the Action was in federal court. The Demurrer also fails substantively, as Defendants constantly rely on federal cases, which do not even stand for the proposition for which they are presented, and ignore California cases while actively misstating facts and Wagner's arguments. Defendants will still have the opportunity to make their arguments, but they should be affirmative defense in an Answer, not in a Demurrer. This Court should overrule the Demurrer in its entirety and order Defendants to file Verified Answers, or at a minimum, grant Wagner leave to amend.

THE LAW OFFICES OF DANIEL BALSAM



(by fax)

Dated: July 16, 2013

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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

17 CHRISTOPHER WAGNER,

18 Plaintiff,

19 v.

20 SPIRE VISION LLC *et al*,

21 Defendants.

) Case No.: SCV-252580

)

) **DECLARATION OF DANIEL BALSAM IN**
) **SUPPORT OF PLAINTIFF'S OPPOSITION**
) **TO DEFENDANTS' DEMURRER**

)

) Code Civ. Proc. § 430.10

)

) Date: August 7, 2013

) Time: 3:30 p.m.

) Judge: Hon. Nancy Case Shaffer

) Dept: 18

22 I, Daniel L. Balsam declare:

- 23 1. I am an attorney duly licensed to practice law in all courts of the State of California. I represent Plaintiff
- 24 Christopher Wagner ("Wagner") in this Action. The following facts are based on my own personal
- 25 knowledge. If called as a witness, I could and would testify competently to the declared facts under oath.
- 26 2. Wagner filed this Action against Defendants on October 25, 2012, alleging violations of Business &
- 27 Professions Code §§ 17529.5 and 17538.5. Defendant Spire Vision LLC alone improperly removed the
- 28 Action to the U.S. District Court for the Northern District of California on January 4, 2013, incorrectly
- 29 alleging complete diversity.

- 1 3. While the Action was in federal court, the various Spire Vision entities collectively filed a Corrected First
2 Amended Answer (federal docket #32) on February 27, 2013 and Accelerize New Media Inc. –
3 represented by the same attorneys – filed an Answer (federal docket #26) on February 6. Exhibit A is a
4 true and correct copy of the first page of each Answer.
- 5 4. Wagner filed a Motion to Remand, which the federal court granted on March 8, and sent a letter to this
6 Court on March 11 so stating.
- 7 5. The Spire Vision entities and Accelerize New Media Inc. then filed the instant Demurrer in this – the
8 original – Court, and refused to withdraw it even after I served (on May 20) and filed (on June 24) a
9 Motion for Sanctions.
- 10 6. Wagner was unable to identify Spire Vision based on the registrations of the sending domain names.
11 However, I have certain knowledge of Spire Vision's business practices, based on other litigation, and I
12 was able to identify the Spire Vision entities as the source of the instant spams.
- 13 7. My co-counsel Timothy Walton and I do not "know [that] the CAN-SPAM Act explicitly preempts all
14 complaints about unsolicited commercial email that do not allege fraud or damages." In fact, Timothy
15 Walton represented me in *Balsam v. Trancos Inc. et al*, 203 Cal. App. 4th 1083 (1st Dist. 2012), *petition for*
16 *review denied*, 2012 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S. LEXIS
17 8423 (U.S. Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S. Jan. 7, 2013), in
18 which the Court of Appeal expressly ruled that claims under Business & Professions Code § 17529.5 are
19 *not* preempted by the CAN-SPAM Act.
- 20 8. The last time I made a demand of Spire Vision on behalf of another client, when those negotiations failed,
21 Spire Vision and one of its advertisers (Davison Design & Development Inc.) sued my client – the recipient
22 of their spams – in federal court for a declaratory judgment. Accordingly, any attempt to negotiate here
23 would have been futile. Wagner decided that he would rather be a plaintiff than a defendant, and initiated
24 this Action.

25
26 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct,
27 and that this Declaration was executed in San Francisco, California, on July 16, 2013.

28
29 

(by fax)

30 DANIEL L. BALSAM

Exhibit A

1 John Du Wors, State Bar No. 233913
 john@newmanlaw.com
 2 Leeor Neta, State Bar No. 233454
 3 leeor@newmanlaw.com
 NEWMAN DU WORS LLP
 4 1201 Third Avenue, Suite 1600
 5 Seattle, WA 98101
 Telephone: (206) 274-2800
 6 Facsimile: (206) 274-2801

7 Attorneys for Defendants

8
 9
 10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

12 Christopher Wagner, an individual,

13 Plaintiff,

14 v.

15 Spire Vision LLC, a Delaware limited
 16 liability company, et al.,

17 Defendants

No. 13-cv-00054-YGR

**ANSWER AND AFFIRMATIVE
 DEFENSES OF ACHIEVE
 OPPORTUNITIES, AGREEWIZARD,
 DIGITAL PUBLISHING
 CORPORATION, MEDIACTIVATE LLC,
 ON DEMAND RESEARCH,
 OPPORTUNITY CENTRAL, PATHS
 DIRECT, PRIME ADVERTISERS LLC,
 PULLSMART, SERVE CLICKS LLC,
 SPIRE VISION LLC, SPIRE VISION
 HOLDINGS INC., WARD MEDIA INC.,
 AND XL MARKETING CORPORATION**

22 Defendants Achieve Opportunities, AgreeWizard, Digital Publishing Corporation,
 23 MediActivate LLC, On Demand Research LLC, Opportunity Central, Paths Direct, Prime
 24 Advertisers LLC, PullSmart, Serve Clicks LLC, Spire Vision LLC, Spire Vision
 25 Holdings Inc., Ward Media Inc., and XL Marketing Corporation, (Collectively,
 26 “Answering Defendants”) answer Plaintiff’s complaint as follows. Each numbered
 27 paragraph corresponds to the numbered paragraph in the complaint.

28 1. Answering Defendants DENY the allegations in Paragraph 1.

1 John Du Wors, State Bar No. 233913
john@newmanlaw.com
2 Leeor Neta, State Bar No. 233454
leeor@newmanlaw.com
3 NEWMAN DU WORS LLP
4 1201 Third Avenue, Suite 1600
Seattle, WA 98101
5 Telephone: (206) 274-2800
6 Facsimile: (206) 274-2801

7 Attorneys for Defendants

8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11

12 Christopher Wagner, an individual,

13 Plaintiff,

14 v.

15 Spire Vision LLC, a Delaware limited
16 liability company, et al.,

17 Defendants

No. 13-cv-00054-YGR

**ANSWER AND AFFIRMATIVE
DEFENSES OF ACCELERIZE NEW
MEDIA, INC.**

JURY TRIAL DEMANDED

18
19 Defendant Accelerize New Media, Inc. ("Accelerize") answers Plaintiff's
20 complaint as follows. Each numbered paragraph corresponds to the numbered paragraph
21 in the complaint.

- 22 1. Accelerize DENIES the allegations in Paragraph 1.
23 2. Accelerize DENIES the allegations in Paragraph 2.
24 3. Accelerize DENIES the allegations in Paragraph 3.
25 4. Accelerize DENIES the allegations in Paragraph 4.
26 5. Accelerize DENIES the allegations in Paragraph 5.
27 6. Accelerize has insufficient information to form a belief as to and therefore
28 DENIES the allegations in Paragraph 6.

1 Timothy J. Walton (State Bar No. 184292)
 2 Jim C. Twu (State Bar No. 175032)
 WALTON TWU LLP
 3 9515 Soquel Drive, Suite 207
 4 Aptos, CA 95003-4137
 Phone (831) 685-9800
 5 Fax: (650) 618-8687

6 Daniel L. Balsam (State Bar No. 260423)
 7 THE LAW OFFICES OF DANIEL BALSAM
 2912 Diamond Street #218
 8 San Francisco, CA 94131
 9 Phone: (415) 869-2873
 10 Fax: (415) 869-2873

11 Attorneys for Plaintiff Christopher Wagner

12
 13
 14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 15 **COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

16 CHRISTOPHER WAGNER,	) Case No.: SCV-252580
17)
18 Plaintiff,	) DECLARATION OF CHRISTOPHER
19 v.	) WAGNER IN SUPPORT OF PLAINTIFF'S
20 SPIRE VISION LLC <i>et al</i>,	) OPPOSITION TO DEFENDANTS'
21	) DEMURRER
22 Defendants.	) Code Civ. Proc. § 430.10
23)
24	) Date: August 7, 2013
25	) Time: 3:30 p.m.
26	) Judge: Hon. Nancy Case Shaffer
27	) Dept: 18

28 I, Christopher Wagner, declare:

- 29 1. I am the Plaintiff in this Action. The following facts are based on my own personal knowledge. If called
 30 as a witness, I could and would testify competently to the declared facts under oath.
 31 2. Despite significant effort, I was unable to identify any of the actual Spire Vision companies on my own
 32 because the From Names did not say who the spams were from, and Spire Vision registered the domain
 33 names they used to send the spams to two random words strung together, claiming addresses at boxes at
 branches of The UPS Store. My attorney Daniel Balsam had to identify Spire Vision for me.

- 1 3. I have a job, I never claimed to be an ISP, and I never sued (or threatened to sue) anyone under the CAN-
2 SPAM Act. I never sought to receive spam for profit or any other motive. I never gave direct consent to
3 receive commercial email to any of the Defendants. I received the spams at issue at an email address that I
4 use every day, not an "abandoned" email address.
- 5 4. I am informed and believe and thereon allege that Riley plans to appeal the order in *Davison Design &*
6 *Development, Inc. v. Riley*, No. 4:11-cv-02970 (PJH), 2012 U.S. Dist. LEXIS 131087 (N.D. Cal. Sept. 13,
7 2012) that ruled that her claims under Business & Professions Code § 17529.5 without proof of reliance
8 and actual damages.
- 9 5. After my attorney Daniel Balsam told me that Spire Vision sued one of his other clients when they were
10 unable to reach a settlement as to claims under Business & Professions Code § 17529.5, I decided that I
11 would rather be a plaintiff than a defendant I asked Daniel Balsam to represent me and sue Spire Vision.

12
13 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct,
14 and that this Declaration was executed in Rohnert Park, California, on July 16, 2013.

15
16 

(by fax)

17 CHRISTOPHER WAGNER
18
19
20
21
22
23
24
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28
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30
31
32
33

<i>Attorney or Party Without Attorney</i> Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 Telephone No.: 415-869-2873 Fax No.: 415-869-2873 Attorney for: Plaintiff Christopher Wagner		
<i>Insert name of Court, and Judicial District and Branch Court:</i> Superior Court of California, County of Sonoma 3055 Cleveland Avenue Santa Rosa, CA 95403 Civil and Family Law Courthouse		
<i>Plaintiff/Petitioner:</i> Christopher Wagner <i>Defendant/Respondent:</i> Spire Vision LLC <i>et al</i>	<i>Case Number:</i> SCV-252580	
<p align="center">PROOF OF SERVICE – CIVIL</p> Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		<i>Judge:</i> Shaffer <i>Courtroom:</i> 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. My residence or business address is: The Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131
4. On (date): July 23, 2013 I served the following **documents** (specify):

Plaintiff's Opposition to Defendants' Demurrer; Declarations of Daniel Balsam and Christopher Wagner
5. I served the documents on the person or persons below, as follows:
 - a. Name of person served: John Du Wors, attorney for Spire Vision entities and Accelerize New Media Inc.
 - b. ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)
Business or residential address where person was served: Newman Du Wors LLP, 1201 Third Avenue, Suite 1600, Seattle, WA 98101
6. The documents were served by the following means (specify):
 - c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Date: July 23, 2013

Daniel L. Balsam

Type or Print Name of Declarant



Signature of Declarant

COPY

Box 145

By Fax

John Du Wors, State Bar No. 233913
 john@newmanlaw.com
 Leeor Neta, State Bar No. 233454
 leeor@newmanlaw.com
 NEWMAN DU WORS LLP
 1201 Third Avenue, Suite 1600
 Seattle, WA 98101
 Telephone: (206) 274-2800
 Facsimile: (206) 274-2801

Attorneys for Defendants

ENDORSED
 FILED

JUL 25 2013

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF SONOMA**

Christopher Wagner, an individual,

Plaintiff,

v.

Spire Vision LLC, a Delaware limited liability
 company, et al.,

Defendants.

Civil Case No. SCV-252580

**DEFENDANTS' OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 SANCTIONS**

Code Civ. Proc. §§ 128.7, 430.90

Hearing Date: August 7, 2013

Hearing Time: 3:30 p.m.

Dept. No. 18

Judge: Hon. Nancy Case Shaffer

I. INTRODUCTION

Plaintiff Christopher Wagner ("Plaintiff") is seeking sanctions because Defendants Spire Vision LLC, et al. ("Defendants") filed a demurrer after this case was remanded from federal court. Plaintiff does not contend that Defendants' demurrer is untimely. And Plaintiff concedes that neither this Court nor the remanding federal court have addressed the important issues raised in Defendants' demurrer. Instead, Plaintiff claims he is entitled to sanctions because Defendants filed a federal court answer prior to remand and Section 430.90 of the Code of Civil Procedure prevents a defendant who answers in federal court from demurring in state court following remand.

1 Plaintiff is misreading Section 430.90, which was merely intended to prevent a
 2 defendant from asking a state court to revisit a demurrer or motion to strike that was
 3 already filed *and* resolved prior to remand. At best, the parties have competing, but
 4 reasonable interpretations of Section 430.90. Under these circumstances, sanctions are
 5 inappropriate.

6 II. PROCEDURAL HISTORY

7 A. Defendants Filed An Answer And A Motion To Dismiss In Federal Court.

8 Plaintiff filed his complaint on October 25, 2012. (*See* Complaint, dated October
 9 25, 2012.) With the exception of Defendant LifeScript, Inc., none of the Defendants
 10 generally appeared in state court before removing this matter to federal court on
 11 January 4, 2013. (*See* Notice of Removal and related documents, filed on January 4, 2013
 12 and January 9, 2013.) Once the matter was removed to federal court, Defendants Achieve
 13 Opportunities, AgreeWizard, Digital Publishing Corporation, MediActivate LLC, On
 14 Demand Research LLC, Opportunity Central, Paths Direct, Prime Advertisers LLC,
 15 PullSmart, Serve Clicks LLC, Spire Vision LLC, Spire Vision Holdings Inc., Ward
 16 Media Inc., and XL Marketing Corporation jointly moved to dismiss the complaint. (*See*
 17 Motion to Dismiss Plaintiff's Complaint, dated January 28, 2013.) Numerous Defendants
 18 later joined in this Motion, including Juniper Marketing LLC (*see* Joinder, dated
 19 February 4, 2013); Accelerize New Media (*see* Joinder, dated February 6, 2013);
 20 Furturesdrive, Junctionlights, Youradshare (*see* Joinder, dated February 7, 2013); and
 21 LifeScript, Inc. (*see* Joinder, dated February 8, 2013). In their motion to dismiss,
 22 Defendants point out that Plaintiff's claims are preempted by federal law and that
 23 Plaintiff has failed to state a cause of action.

24 Defendants Achieve Opportunities, AgreeWizard, Digital Publishing Corporation,
 25 MediActivate LLC, On Demand Research LLC, Opportunity Central, Paths Direct, Prime
 26 Advertisers LLC, PullSmart, Serve Clicks LLC, Spire Vision LLC, Spire Vision
 27 Holdings Inc., Ward Media Inc., and XL Marketing Corporation also filed an answer (*see*
 28 Answer, dated January 28, 2013) in which several other Defendants later joined,

1 including Juniper Marketing LLC (*see* Amended Answer, dated February 4, 2013),
 2 Accelerize New Media (*see* Answer, dated February 6, 2013), Furturesdrive,
 3 Junctionlights, and Youradshare (*see* Answer, dated February 7, 2013.)

4 **B. The Federal Court Never Heard Defendants' Motion To Dismiss.**

5 The federal court never heard Defendants' motion to dismiss. On March 8, 2013,
 6 the Honorable Yvonne Gonzalez Rogers directed the clerk of the U.S. District Court to
 7 remand the matter to this Court. (*See* Order Granting In Part Plaintiff's Motion to
 8 Remand, Denying Request for Attorneys' Fees, dated March 8, 2013.) On March 11,
 9 2013, the clerk of the U.S. District Court transmitted to this Court copies of the federal
 10 court docket, including Judge Rogers' remand order, and asked that the Court
 11 acknowledge receipt. (*See* Letter Transmitting Order and Docket Entries, dated March
 12 11, 2013.)

13
 14 **C. Following Remand, Defendants Filed A Demurrer That Raised The Same
 Issues As The Motion To Dismiss Which The Federal Court Never Heard.**

15 It is unclear when this Court in fact received the order of remand. On May 2, after
 16 extending this Court an opportunity to express its wishes regarding next steps—either in
 17 the form of a scheduling or case management order—Defendants' filed a demurrer that
 18 raised similar issues to those contained in the motion to dismiss they filed in federal court
 19 prior to remand. (*See* Demurrer and all related documents, filed May 2, 2013.) Again, the
 20 federal court never addressed the issues raised in Defendants' demurrer.

21 **III. DISCUSSION**

22 **A. Wagner Is Misinterpreting Section 430.90 Of The Code Of Civil Procedure.**

23 Plaintiff's sanctions motion is predicated on a misreading of Section 430.90 of the
 24 Code of Civil Procedure. Section 430.90 provides responsive deadlines in certain limited
 25 circumstances where a civil action was removed to federal court and later remanded to
 26 the original court. Subsection (a)(2) provides certain responsive deadlines where a
 27 defendant did *not* file an answer in the original state court prior to removal:

28 (2) If the defendant has not filed an answer in the original court, then 30

days from the day the original court receives the case on remand to do any of the following:

(A) Answer the complaint.

(B) Demur or move to strike all or a portion of the complaint if: (i) an answer was not filed in the federal court, and (ii) a demurrer or motion to strike raising the same or similar issues was not filed and ruled upon by the original court prior to the removal of the action to federal court or was not filed and ruled upon in federal court prior to the remand. If the demurrer or motion to strike is denied by the court, the defendant shall have 30 days to answer the complaint unless an answer was filed with the demurrer or motion to strike.

Code Civ. Proc., § 430.90.

While this language seems to address some potential scenarios following remand, it does not address all of them. For example, it is clear that a defendant who has not filed an answer in the original court has 30 days from the date of the original court's receipt of the remand to file a state court answer if the defendant so wishes. But it is not clear what timeframe governs a defendant who has not filed an answer in the original court and who wishes to file a demurrer or motion to strike following remand. The Code seems to require that a demurrer or motion to strike be filed within 30 days of the original court receiving the order of remand only when *both* of two conditions are met: (1) an answer was not filed in federal court; *and* (2) a demurrer or motion to strike raising the same or similar issues was *not* previously filed *and* ruled upon by either the original court or the federal court.

Section 430.90 does not address the specific circumstances presented here. Defendants did not file a responsive state court pleading before removing this matter to federal court. Defendants filed an answer in federal court. But Defendants also filed a Rule 12(b)(6) motion in federal court that raised similar issues to those pressed in the state court demurrer they later filed following remand. The federal court did not rule upon or address Defendants' Rule 12(b)(6) motion prior to ordering remand. As a result, our procedural posture does not meet Section 430.90's specific limitations, i.e., no answer filed in federal court *and* no demurrer or motion to strike raising the same or similar issues filed *and* ruled upon. And—for that reason—Defendants were free to

1 demurrer following remand to this Court.

2 Plaintiff misstates Defendants' position. It is not Defendants' position that Section
3 430.90 applies no conditions to the filing of a demurrer following remand. (*See* Plaintiff's
4 Motion for Sanctions, dated June 29, 2013, at 5.) Defendants merely contend that Section
5 430.90 does not speak to the procedural posture of this case, i.e., where an answer was
6 filed in federal court *and* a demurrer was previously filed *but not* ruled upon by either the
7 original court or the federal court.

8 Plaintiff claims that Section 430.90 expressly bars a defendant who filed a federal
9 court answer from filing a demurrer following remand. But if that were true, the
10 legislature would not have written Section 430.90 so as to include subsection
11 (a)(2)(B)(ii). If the legislature's intention were as Plaintiff suggests, section 430.90,
12 subsection (a)(2), would read as follows:

13 (2) If the defendant has not filed an answer in the original court, then 30
14 days from the day the original court receives the case on remand to do
any of the following:

15 (A) Answer the complaint.

16 (B) Demur or move to strike all or a portion of the complaint: ~~(i) if an~~
17 ~~answer was not filed in the federal court, and (ii) a demurrer or motion~~
18 ~~to strike raising the same or similar issues was not filed and ruled upon~~
19 ~~by the original court prior to the removal of the action to federal court~~
20 ~~or was not filed and ruled upon in federal court prior to the remand. If~~
~~the demurrer or motion to strike is denied by the court, the defendant~~
~~shall have 30 days to answer the complaint unless an answer was filed~~
~~with the demurrer or motion to strike.~~

21 (b) For the purposes of this section, time shall be calculated from the date
of the original court's receipt of the order of remand.

22 Instead, the legislature limited Section 430.90 to a number of specific circumstances,
23 none of which are at issue in this case.

24 Defendants submit that Section 430.90 was intended to prevent a defendant from
25 asking a state court to revisit a demurrer or motion to strike that was already filed *and*
26 resolved prior to remand. But where the issues in the demurrer or motion to strike were
27 not resolved before remand, Section 430.90 would not prevent a defendant from posing
28 the same questions to the original court after remand. Were Section 430.90 read

1 otherwise—as Plaintiff suggests—state courts would be prevented from reaching
 2 important questions raised in a demurrer or motion to strike whenever a defendant files a
 3 federal court answer prior to remand. There is no rationale for such a reading of Section
 4 430.90.

5 Because neither Section 430.90 nor any other section of the Code of Civil
 6 Procedure speaks to the procedural posture of this case, Defendants contend that their
 7 state court demurrer is not inappropriate.

8
 9 **B. Even If Plaintiff Is Not Misinterpreting Section 430.90, Defendants’ Reading
 Is Certainly Neither Frivolous Nor Harassing.**

10 Plaintiff’s motion for sanctions is predicated on the claim that Section 430.90
 11 expressly bars Defendants from filing a demurrer following remand because they filed a
 12 federal court answer prior to remand. Plaintiff’s reading seems to ignore subsection
 13 (a)(2)(B)(ii) of Section 430.90.

14 Defendants contend that Section 430.90 does not speak to the specific procedural
 15 posture of this case, i.e., where an answer was filed in federal court *and* a demurrer was
 16 filed *but not* previously ruled upon by either the original court or the federal court.

17 Defendants do not suggest they could have filed a demurrer in state court even if
 18 the federal court had already decided the same or similar issues. Defendants are confident
 19 that their demurrer raises important questions as to whether Plaintiff’s claims are
 20 preempted and whether Plaintiff has stated a cause of action. And despite Plaintiff’s
 21 claims to the contrary, at least one court deserves the opportunity to address these
 22 questions.

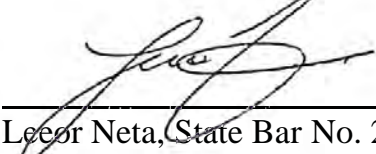
23 The procedural posture of this case does not suggest that Defendants’ reading of
 24 Section 430.90 is “frivolous” or that their demurrer was “motivated by an intention to
 25 harass.” (*See* Plaintiff’s Motion for Sanctions, dated June 29, 2013, at 3-4.) At best, the
 26 parties have a reasonable dispute as to the scope and interpretation of Section 430.90. As
 27 such, sanctions are inappropriate.
 28

IV. CONCLUSION

Plaintiff is not entitled to sanctions. His request depends on an incorrect and irrational reading of Code of Civil Procedure, Section 430.90. Section 430.90 was merely intended to prevent a defendant from asking a state court to revisit a demurrer or motion to strike that was already filed *and* resolved prior to remand. Here, however, the issues raised in the post-remand demurrer were not previously addressed by any court. Even if this Court were inclined to give credence to Plaintiff's reading of Section 430.90, it is obvious there are competing, but reasonable interpretations of Section 430.90. There is no merit to Plaintiff's suggestion that these circumstances support a sanctions order.

Date: July 25, 2013

NEWMAN DU WORS LLP



Leeor Neta, State Bar No. 233454
John Du Wors, State Bar No. 233913
Attorneys for Defendants
Spire Vision LLC, et al.

1 John Du Wors, State Bar No. 233913
john@newmanlaw.com
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3 NEWMAN DU WORS LLP
4 1201 Third Avenue, Suite 1600
Seattle, WA 98101
5 Telephone: (206) 274-2800
6 Facsimile: (206) 274-2801

7 Attorneys for Defendants

RECEIVED

JUL 25 2013

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SONOMA**
11

12 Christopher Wagner, an individual,

13 Plaintiff,

14 v.

15 Spire Vision LLC, a Delaware limited liability
16 company, et al.,

17 Defendants.
18

Civil Case No. SCV-252580

**[PROPOSED] ORDER DENYING
PLAINTIFF'S MOTION FOR
SANCTIONS**

Hearing Date: August 7, 2013

Hearing Time: 3:30 p.m.

Dept. No. 18

Judge: Hon. Nancy Case Shaffer

19 Plaintiff's Motion for Sanctions came on for hearing in Department 18 of this
20 Court on August 7, 2013. Leeor Neta appeared on behalf of Defendants Spire Vision
21 LLC, et al. _____ appeared on behalf of Plaintiff Christopher
22 Wagner.

23 Having read and considered the motion, the memoranda filed by the parties, and
24 having heard argument of counsel,

25 IT IS ORDERED THAT Plaintiff's Motion for Sanctions, dated May 20, 2013, is
26 DENIED.
27
28

COPY

By Fax

Box 145

1 DATED THIS _____ DAY OF _____, 2013.

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5 _____
6 Honorable Nancy Case Shaffer
7 Judge of the Superior Court
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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="text-align: center; font-size: 1.2em;">SCV-252580</div>
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.	
<div style="text-align: center;"> PROOF OF SERVICE—CIVIL Check method of service (only one): <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Messenger Service </div> <div> <input type="checkbox"/> By Mail <input type="checkbox"/> By Fax </div> <div> <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Electronic Service </div> </div> </div>	
JUDGE: Mark Tansil DEPT.: 18	

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My residence or business address is:
 1201 Third Avenue, Suite 1600, Seattle, WA 98101
3. ☐ The fax number or electronic notification address from which I served the documents is *(complete if service was by fax or electronic service)*:
4. On (date): **July 25, 2013** I served the following **documents** (specify):
 DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS, [PROPOSED] ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS

☒ The documents are listed in the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:

- a. Name of person served: **Daniel L. Balsam**
- b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- c. ☐ *(Complete if service was by fax or electronic service.)*

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means (specify):

- a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
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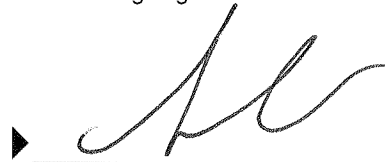
6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (*specify one*):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):
- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.*)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: July 25, 2013

Lindsey Rowson

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)



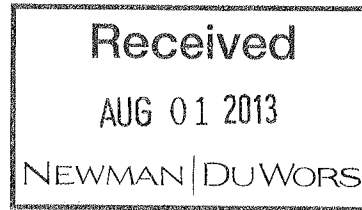
(SIGNATURE OF DECLARANT)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
---	----------------------------

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This attachment is for use with form POS-040.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

Timothy J. Walton (State Bar No. 184292)
 Jim C. Twu (State Bar No. 175032)
 WALTON TWU LLP
 9515 Soquel Drive, Suite 207
 Aptos, CA 95003-4137
 Phone (831) 685-9800
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Daniel L. Balsam (State Bar No. 260423)
 THE LAW OFFICES OF DANIEL BALSAM
 2912 Diamond Street #218
 San Francisco, CA 94131
 Phone: (415) 869-2873
 Fax: (415) 869-2873

Attorneys for Plaintiff Christopher Wagner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA (UNLIMITED JURISDICTION)

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) PLAINTIFF'S REPLY TO
	) DEFENDANTS' OPPOSITION TO
v.	) PLAINTIFF'S MOTION FOR
	) SANCTIONS
SPIRE VISION LLC <i>et al</i> ,)
	) Code Civ. Proc. §§ 128.7, 430.90
Defendants.)
	) Date: August 7, 2013
	) Time: 3:30 p.m.
	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

I. INTRODUCTION

The Parties basically agree on the procedural history. There is no dispute that Code of Civil Procedure § 430.90 ("Section 430.90"), subsection (a)(2) applies to the current procedural posture of this Action, because Defendants Spire Vision LLC and its numerous related companies and "brands" (collectively, "Spire Vision") and Defendant Accelerize New Media

1 Inc. (“Accelerize”) did *not* file Answers in this Court, improvidently removed the Action, *did* file
2 Answers in federal court, and now that the case has been remanded, they filed a Demurrer.

3 However, Defendants [mis]interpret Section 430.90(a)(2) in a manner that defies logic,
4 statutory construction, grammar, and civil procedure. Based on the plain language of the statute,
5 any reasonable attorney should know that a defendant in a state court action who: a) does not file
6 an answer in state court, b) removes the action to federal court, c) files an answer while in federal
7 court, and d) is then remanded to state court, cannot then file a demurrer in state court.

8 Defendants’ position is utterly without merit and shows intent to stall the proceedings and
9 to run up Plaintiff Christopher Wagner’s (“Wagner”) attorneys’ fees. Defendants should have
10 withdrawn their Demurrer to Wagner’s Verified Complaint after he served the Motion for
11 Sanctions. They did not do so, even though they could have turned the substance of their
12 Demurrer into affirmative defenses in an Answer. This Court should award Wagner sanctions
13 because he incurred significant attorneys’ fees preparing the Motion for Sanctions and this
14 Reply, and opposing Defendants’ improper Demurrer.

15 16 **II. DISCUSSION**

17 Defendants previously led Wagner to believe that they were refusing to withdraw their
18 Demurrer because they interpreted Section § 430.90(a)(2)(B) such that the two conditions only
19 applied to motions to strike, and not to demurrers. Wagner rebutted this interpretation in his
20 Motion for Sanctions and in his Opposition to Defendant’s Demurrer, and will not repeat it here.

21 In their Opposition to the Motion for Sanctions, Defendants now take a different
22 approach: Ignoring the first condition – that a demurrer is permissible after remand only if an
23 answer was not filed in federal court – altogether.

24 **A. Defendants Admit that Their Demurrer Was Only Permissible If They Had Not Filed** 25 **Answers in Federal Court**

26 Defendants paraphrase Section 430.90(a)(2)(B) in their Opposition at 4:14-19 and admit
27 that “only when *both* of two conditions are met” (emphasis in original) can a defendant file a
28 demurrer after remand. Those conditions are:

- 29 • *Condition #1:* An answer was not filed in federal court.
- 30 • *Condition #2:* A demurrer or motion to strike raising the same or similar issues
31 was not previously filed and ruled upon by the original court or the federal court.

1 But Defendants *did* file an Answer in federal court, rendering their Demurrer improper and their
2 attempt to justify the Demurrer frivolous.

3 **B. The Fact That the Federal Court Did Not Rule on Defendants' Rule 12(b)(6) Motion to**
4 **Dismiss is Irrelevant; It Does Not Change the Fact That Defendants Filed Answers in**
5 **Federal Court**

6 Defendants gripe that the federal court did not rule on their Rule 12(b)(6) Motion to
7 Dismiss while the matter was in federal court. Opposition at 4:22-25. That is true – the federal
8 court did *not* rule. The federal court *could* not rule, because there never was federal jurisdiction,
9 which is precisely why the federal court granted Wagner's Motion to Remand after the improper
10 removal.

11 The specific circumstances of this dispute – Defendants filed a Motion to Dismiss in
12 federal court that was not heard prior to remand – is precisely what Condition #2 addresses. The
13 procedural posture of this dispute meets Condition #2, but that matters not a bit, because
14 Defendants already admitted that “only when *both* of two conditions are met,” Opposition at
15 4:16 (emphasis in original), could they file a Demurrer to Wagner's Complaint. There is no
16 dispute that Defendants filed Answers in federal court. Therefore, there can be no dispute that
17 Condition #1 fails. As Condition #1 fails, so does Defendants' opportunity to file a Demurrer in
18 this Court after remand.

19 Defendants' protestations aside, it really is that simple. Defendants' acknowledgment
20 that they can only file a Demurrer if they have *not* filed an Answer in federal court is precisely
21 what renders Defendants' filing and refusing to withdraw the Demurrer sanctionable conduct.

22 **C. Defendants Confuse the Procedural Posture of this Action With the Required**
23 **Conditions for a Demurrer After Remand. Defendants' Interpretation Ignores**
24 **Condition #1: A Demurrer is Only Permissible if an Answer Has Not Been Filed in**
25 **Federal Court**

26 Defendants attempt to muddy the waters by proposing hypothetical statutory language in
27 their Opposition at 5:16-20. But Defendants' hypothetical does not follow from Wagner's
28 position. All Condition #2 says is that defendants do not get a second bite at the apple; i.e., if a
29 demurrer *had* already been filed and ruled upon in state or federal court, then a defendant cannot
30 file a similar demurrer in state court after remand. So, whether Condition #2 is present here or
31 not, nothing changes the fact that Condition #1 permits a demurrer in state court after remand
only if an answer were *not* filed in federal court. It is not subject to dispute that Defendants *did*
file Answers in federal court.

1 Defendants appear to confuse the procedural posture of this case with the necessary
2 conditions for a demurrer after remand:

3 Defendants contend that Section 430.90 does not speak to the specific procedural
4 posture of this case, i.e., where an answer was filed in federal court *and* a
5 demurrer was filed *but not* previously ruled upon by either the original court or the
6 federal court.

7 Opposition at 6:14-16.

8 As stated immediately above, "...*and* a demurrer [actually a Rule 12(b)(6) motion] was
9 filed *but not* previously ruled upon" is an accurate description of what happened while this action
10 was in federal court, but that does not mean in any way that Section 430.90(a)(2)(B) does not
11 apply to the current status of this Action. Rather, Section 430.90(a)(2) applies because
12 Defendants did not answer before removal and now the case has been remanded, and subsection
13 (B) sets forth two conditions, and *both* of those conditions must be met for Defendants to file a
14 Demurrer. Here, Condition #1 is *not* met.

15 Defendants then claim that

16 Section 430.90 was intended to prevent a defendant from asking a state court to
17 revisit a demurrer or motion to strike that was already filed *and* resolved prior to
18 remand. But where the issues in the demurrer or motion to strike were not
19 resolved before remand, Section 430.90 would not prevent a defendant from
20 posing the same questions to the original court after remand.

21 Demurrer at 5:24-28. Wagner actually agrees with *this* part of Defendants' submission;
22 preventing re-litigating the same issue is precisely why Section 430.90(a)(2)(B) includes
23 Condition #2: A demurrer or motion to strike raising the same or similar issues was *not*
24 previously filed and ruled upon by either the original court or the federal court.

25 But, of course, that assumes that the defendant *only* filed a demurrer (or Rule 12(b)(6)
26 Motion to Dismiss) in federal court which was not ruled on, and the defendant did *not* file an
27 answer in federal court.

28 Defendants' logic fails in the second part of their submission:

29 Were Section 430.90 read otherwise – as Plaintiff suggests – state courts would be
30 prevented from reaching important questions raised in a demurrer or motion to
31 strike whenever a defendant files a federal court answer prior to remand. There is
no rationale for such a reading of Section 430.90.

Demurrer at 5:28-6:3. This is precisely what Wagner suggests: State courts *are* “prevented from reaching important questions raised in a demurrer or motion to strike” after remand, if the defendant filed an answer in federal court before remand. Defendants fail to explain how their position can possibly make sense, given that Section 430.90(a)(2)(B) includes Condition #1 – an answer was *not* filed in the federal court – and Defendants *did* file Answers in federal court.

Wagner’s position – that a state court cannot entertain a demurrer after remand when defendant filed an answer in federal court before remand – makes intuitive sense. A demurrer tests whether the plaintiff has stated a valid claim; a defendant files an answer when a plaintiff *has* stated a claim. Therefore, it makes no sense, procedurally, to allow a defendant to demur and argue that the plaintiff has *not* stated a claim after the defendant has *already answered* – a tacit admission that the plaintiff *did* state a claim.

D. Wagner Increases His Request for Attorneys’ Fees

If Defendants had withdrawn their Demurrer after Wagner’s informal request, or after Wagner’s formal service of the Motion for Sanctions, Wagner would not have had to write this Reply or oppose the Demurrer.

Wagner’s attorney Daniel Balsam predicted – at the time that he filed the Motion for Sanctions – that he would have to spend 7.0 hours opposing the Demurrer. However, Defendants raised many issues in their Demurrer, and because it takes more text to explain *why* false statements of fact and law are false than to actually make the false statements in the first place, and given the limit of only 15 pages, it actually took Wagner’s attorney Daniel Balsam 17.0 hours to write, serve, and file the Opposition to the Demurrer, versus the expected 7.0 hours. Declaration of Daniel Balsam at ¶ 4. Balsam also spent 2.1 hours on the Motion for Sanctions, 3.0 hours for this Reply, and expects to spend 4.5 hours traveling to and attending the hearing. *Id.* at ¶¶ 2, 3, 5. Balsam’s regular billing rate is \$250 per hour. *Id.* at ¶ 6.

III. CONCLUSION

Defendants’ position makes no sense, whether viewed from the perspective of logic, statutory construction, plain language, grammar, or civil procedure. Defendants’ Demurer is the very essence of a frivolous motion, because they completely ignore the fact that Section 430.90 unequivocally states that a defendant can only file a demurrer after remand if the defendant did *not* file an answer while in federal court.

1 Defendants can still make the substantive arguments from their Demurrer -- the emails
2 aren't spams, and even if the emails are spams they don't violate Business & Professions Code
3 § 17529.5, and even if the spams do violate Business & Professions Code § 17529.5 Wagner's
4 claims are preempted by the federal CAN-SPAM Act, etc. -- but they will have to make those
5 arguments as affirmative defenses in their Answers. Wagner should not have had to incur
6 attorneys' fees opposing Defendants' Demurrer that never should have been filed in the first
7 place.

8 After overruling Defendants' Demurrer in its entirety, this Court should grant Wagner's
9 Motion for Sanctions in the amount of \$90 for costs, *id.* at ¶ 7, and \$6,650 for attorneys' fees
10 (26.6 hours x \$250 per hour).

11 THE LAW OFFICES OF DANIEL BALSAM

12
13 Date: July 30, 2013

14 BY: 

DANIEL L. BALSAM

Attorneys for Plaintiff Christopher Wagner

Timothy J. Walton (State Bar No. 184292)
 Jim C. Twu (State Bar No. 175032)
 WALTON TWU LLP
 9515 Soquel Drive, Suite 207
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 San Francisco, CA 94131
 Phone: (415) 869-2873
 Fax: (415) 869-2873

Attorneys for Plaintiff Christopher Wagner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA (UNLIMITED JURISDICTION)

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) DECLARATION OF DANIEL BALSAM
	) IN SUPPORT OF PLAINTIFF'S REPLY
v.	) TO DEFENDANTS' OPPOSITION TO
	) PLAINTIFF'S MOTION FOR
SPIRE VISION LLC <i>et al</i>,	) SANCTIONS
)
Defendants.	) Code Civ. Proc. §§ 128.7, 430.90
)
	) Date: August 7, 2013
	) Time: 3:30 p.m.
	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

I, Daniel L. Balsam declare:

- I am an attorney duly licensed to practice law in all courts of the State of California. I represent Plaintiff Christopher Wagner in this lawsuit. The following facts are based on my own personal knowledge. If called as a witness, I could and would testify competently to the declared facts under oath.

2. I spent 2.1 hours preparing Wagner's Motion for Sanctions.
3. Because Defendants did not timely withdraw their Demurrer to Wagner's Verified Complaint after being served with Wagner's Motion for Sanctions, I spent 3.0 hours preparing this Reply to Defendants' Opposition to Wagner's Motion for Sanctions.
4. Because Defendants did not timely withdraw their Demurrer to Wagner's Verified Complaint after being served with Wagner's Motion for Sanctions, I spent 17.0 hours opposing Defendants' Demurrer. (I predicted – at the time that I filed Wagner's Motion for Sanctions – that I would have to spend 7.0 hours opposing the Demurrer. However, Defendants raised many issues in their Demurrer, and because it takes more text to explain why false statements are false than to make false statements in the first place, and given the limit of only 15 pages, it actually took me far longer than I originally expected.)
5. I expect to spend at least 4.5 hours appearing at the hearing on Wagner's Motion for Sanctions and Defendants' Demurrer to Wagner's Verified Complaint.
6. My professional rate is \$250 per hour, which I believe is consistent with attorneys at my level of experience in the San Francisco Bay Area.
7. Wagner incurred costs of \$90 for filing this Motion for Sanctions and reporting.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed in San Francisco, California, on July 30, 2013.



DANIEL L. BALSAM

<i>Attorney or Party Without Attorney</i> Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 Telephone No.: 415-869-2873 Fax No.: 415-869-2873 Attorney for: Plaintiff Christopher Wagner		
<i>Insert name of Court, and Judicial District and Branch Court:</i> Superior Court of California, County of Sonoma Civil and Family Law Courthouse 3055 Cleveland Avenue Santa Rosa, CA 95403		
<i>Plaintiff/Petitioner:</i> Christopher Wagner <i>Defendant/Respondent:</i> Spire Vision LLC et al		<i>Case Number:</i> SCV-252580
<p style="text-align: center;">PROOF OF SERVICE – CIVIL</p> Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Two-Day Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		<i>Judge:</i> Shaffer <i>Courtroom:</i> 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. My residence or business address is:
The Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131
4. On (date): July 30, 2013 I served the following **documents** (specify):

Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Sanctions, Declaration of Daniel Balsam
5. I served the documents on the person or persons below, as follows:
 - a. Name of person served:
John Du Wors – attorney for Spire Vision entities, Accelerize New Media Inc.
 - b. ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)
Business or residential address where person was served:
Newman Du Wors LLP, 1201 Third Avenue, Suite 1600, Seattle, WA 98101
6. The documents were served by the following means (specify):
 - c. ☒ **By two-day delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and two-day delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Date: July 30, 2013

Daniel L. Balsam

Type or Print Name of Declarant



Signature of Declarant

PROOF OF SERVICE – CIVIL

COPY

By Fax

Box 145

1 John Du Wors, State Bar No. 233913
 2 john@newmanlaw.com
 3 Leeor Neta, State Bar No. 233454
 4 leeor@newmanlaw.com
 5 NEWMAN DU WORS LLP
 6 1201 Third Avenue, Suite 1600
 7 Seattle, WA 98101
 8 Telephone: (206) 274-2800
 9 Facsimile: (206) 274-2801

10 Attorneys for Defendants

**ENDORSED
FILED**

AUG - 5 2013

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA**

11 Christopher Wagner, an individual,

12 Plaintiff,

13 v.

14 Spire Vision LLC, a Delaware limited liability
 15 company, et al.,

16 Defendants.

Civil Case No. SCV-252580

**DECLARATION OF LEEOR NETA
REGARDING MEET AND
CONFER CONFERENCE ON
DEFENDANTS' DEMURRER TO
COMPLAINT OF PLAINTIFF
CHRISTOPHER WAGNER
(SONOMA COUNTY LOCAL
RULE 5.4)**

Hearing Date: August 7, 2013

Hearing Time: 3:30 pm

Dept. No. 18

Judge: Hon. Nancy Case Shaffer

17 I, Leeor Neta, declare as follows:

18 1. I am an attorney with Newman Du Wors LLP, counsel for Defendants
 19 Spire Vision LLC, et al. I have personal knowledge of the facts set forth in this
 20 declaration and could and would competently testify to them under oath if called as a
 21 witness.

22 2. On Thursday, August 1, counsel for Plaintiff Christopher Wagner, Dan
 23 Balsam, and I spoke by telephone for 45 minutes in a reasonable and good faith attempt
 24 to informally resolve Defendants' demurrer to Plaintiff Wagner's complaint.
 25

I declare under penalty of perjury that the foregoing is true and correct.


Leor Neta

POS-040

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.		FOR COURT USE ONLY ENDORSED FILED AUG - 5 2013 SUPERIOR COURT OF CALIFORNIA COUNTY OF SONOMA
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse		
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.		
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		CASE NUMBER: SCV-252580 JUDGE: Nancy Shaffer DEPT.: 18

(Do not use this proof of service to show service of a Summons and complaint.)

- At the time of service I was over 18 years of age and not a party to this action.
- My residence or business address is:
1201 Third Avenue, Suite 1600, Seattle, WA 98101
- ☐ The fax number or electronic notification address from which I served the documents is (complete if service was by fax or electronic service):
- On (date): August 5, 2013 I served the following documents (specify):

DECLARATION OF LEEOR NETA REGARDING MEET AND CONFER CONFERENCE ON
 DEFENDANTS' DEMURRER TO COMPLAINT OF PLAINTIFF CHRISTOPHER WAGNER (SONOMA
 COUNTY LOCAL RULE 5.4)

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

5. I served the documents on the person or persons below, as follows:

- Name of person served: Daniel L. Balsam
- ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- ☐ (Complete if service was by fax or electronic service.)

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

6. The documents were served by the following means (specify):

- ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

COPY

By Fax

Box 145

POS-040

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
--	-----------------------------------


6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (*specify one*):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):
- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.*)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 5, 2013

Sarah Skaggs

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.


At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

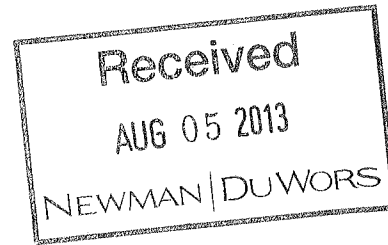
(NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
---	----------------------------

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This attachment is for use with form POS-040.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____



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Attorneys for Plaintiff Christopher Wagner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA (UNLIMITED JURISDICTION)

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) DECLARATION OF DANIEL BALSAM
	) RE: MEET AND CONFER BEFORE
v.	) HEARING
)
SPIRE VISION LLC <i>et al</i>,	) Date: August 7, 2013
	) Time: 3:30 p.m.
Defendants.	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

I, Daniel L. Balsam declare:

1. I am an attorney duly licensed to practice law in all courts of the State of California.
2. I represent Plaintiff Christopher Wagner in this lawsuit.
3. On August 1, 2013, I met and conferred with Leeor Neta (representing the Spire Vision and Accelerize New Media Inc. defendants) by telephone for approximately 45 minutes as to:
 - Defendants' Demurrer to the Complaint,
 - Wagner's Motion for Sanctions as to Defendants' Demurrer to the Complaint, and
 - Wagner's Demurrer to Defendants' Answers.

1 4. Neither one of us was able to convince the other that the other's position is incorrect. We
2 were unable to resolve any of our issues through the meet and confer process.
3

4 I declare under penalty of perjury under the laws of the State of California that the foregoing is
5 true and correct, and that this Declaration was executed in San Francisco, California, on August
6 1, 2013.

7 
8 _____
9 DANIEL L. BALSAM
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<i>Attorney or Party Without Attorney</i> Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 Telephone No.: 415-869-2873 Fax No.: 415-869-2873 Attorney for: Plaintiff Christopher Wagner		
<i>Insert name of Court, and Judicial District and Branch Court:</i> Superior Court of California, County of Sonoma Civil and Family Law Courthouse 3055 Cleveland Avenue Santa Rosa, CA 95403		
<i>Plaintiff/Petitioner:</i> Christopher Wagner <i>Defendant/Respondent:</i> Spire Vision LLC et al	<i>Case Number:</i> SCV-252580	
<p align="center">PROOF OF SERVICE – CIVIL</p> Check method of service (only one): <input type="checkbox"/> By Personal Service <input checked="" type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		<i>Judge:</i> Shaffer <i>Courtroom:</i> 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. My residence or business address is:
The Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131
4. On *(date)*: August 1, 2013 I served the following **documents** *(specify)*:

Declaration of Daniel Balsam re: Meet and Confer Before Hearing
5. I served the documents on the person or persons below, as follows:
 - a. Name of person served:
John Du Wors – attorney for Spire Vision entities, Accelerize New Media Inc.
 - b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*
Business or residential address where person was served:
Newman Du Wors LLP, 1201 Third Avenue, Suite 1600, Seattle, WA 98101
6. The documents were served by the following means *(specify)*:
 - b. ☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:
(1) ☒ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid..
I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*: San Francisco, CA

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Date: August 1, 2013

Daniel L. Balsam
Type or Print Name of Declarant


Signature of Declarant

PROOF OF SERVICE – CIVIL

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 10 2912 Diamond Street #218
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14 Attorneys for Plaintiff Christopher Wagner

FILED

AUG - 7 2013

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA
 By [Signature] DEPUTY CLERK

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 16 **COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

17 CHRISTOPHER WAGNER.	) Case No.: SCV-252580
18 Plaintiff,)
19 v.	) [PROPOSED] ORDER RE: 1) DEFENDANTS'
20 SPIRE VISION LLC <i>et al</i>,	) DEMURRER TO COMPLAINT,
21 Defendants.	) 2) PLAINTIFF'S DEMURRER TO
	) DEFENDANTS' ANSWERS, AND
	) 3) PLAINTIFF'S MOTION FOR SANCTIONS
)
	) Date: August 7, 2013
	) Time: 3:30 p.m.
	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

25 The Demurrer filed jointly by Defendants Spire Vision LLC *et al* "Spire Vision" and
 26 Accelerize New Media Inc. ("Accelerize") to Plaintiff Christopher Wagner's ("Wagner") Verified
 27 Complaint came on regularly for hearing by the Court on August 7, 2013 in Department 18 of the
 28 Superior Court of Sonoma County, along with Wagner's Demurrer to Spire Vision and Accelerize's
 29 (separate) Answers, and Wagner's Motion for Sanctions for Defendants' refusal to withdraw their
 30 Demurrer. The Parties appeared through their counsel of record. Having considered the papers
 31 submitted and oral argument, the Court determined accordingly:

Background

This case was originally filed in Sonoma County Superior Court; then removed to federal district court. The federal court remanded the case back to this court. Defendants Spire Vision LLC (hereafter "Spire Vision") and Accelerize New Media, Inc. (hereafter "Accelerize") did not file responsive pleadings until after the case had been removed to federal court, where they filed answers and a motion to dismiss. After the case was remanded by the federal court, the plaintiff filed a demurrer to the answers that Spire Vision and Accelerize had filed in the federal action, which were not on file in this case. On May 2, 2013, defendants Spire Vision and Accelerize filed a demurrer to the complaint. Plaintiff has filed a motion seeking sanctions against the moving defendants alleging they acted improperly by filing demurrers to the complaint.

On May 29, 2013, this court heard the plaintiff's demurrer to their answer. The hearing was continued to August 7, 2013 because no answers on behalf of defendants Spire Vision or Accelerize were on file in this action. The plaintiff filed the answers filed while the case was pending in federal court as an attachment to the order after hearing.

Demurrer to Complaint

The demurrer to the complaint filed by defendants Spire Vision and Accelerize is overruled. See Code Civ. Proc. §430.90(b)(2)(B):

Where the defendant has removed a civil action to federal court without filing a response in the original court and the case is later remanded for improper removal, the time to respond shall be as follows: . . . Demur or move to strike all or a portion of the complaint if: (i) an answer was not filed in the federal court, **and** (ii) a demurrer or motion to strike raising the same or similar issues was not filed and ruled upon by the original court prior to the removal of the action to federal court or was not filed and ruled upon in federal court prior to the remand . . .

Since the defendants Spire Vision and Accelerize answered the complaint in the federal court, the only responsive pleading they may file upon remand is an answer. (CCP §430.90(a)(2)(A)). Section 430.90(a)(2)(A) does not allow a defendant to adopt an answer filed in the federal court. On the contrary, this section requires that the defendant file an answer "if [it] has not filed an answer in the original court."

Defendants Spire Vision and Accelerize shall have ten days from the date of service of this order to file answers to the complaint.

//

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1 **Demurrer to Answer**

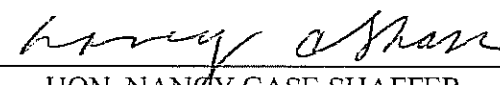
2 Since no operative answer is on file in this case, the plaintiff's demurrer is premature and is
3 overruled, without prejudice.

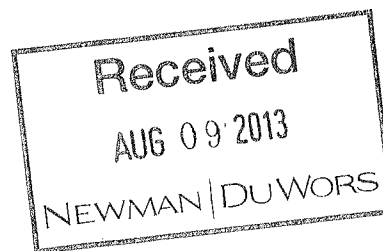
4 **Motion for Sanctions**

5 Based on the demurrers to the complaint filed by defendants Spire Vision and Accelerize,
6 plaintiff has filed a motion for sanctions. Plaintiff has satisfied the procedural requirements for filing a
7 motion for sanctions pursuant to CCP §128.7. Under all of the circumstances before the court, taking
8 into consideration both demurrers before the court, sanctions are denied.

9
10 IT IS SO ORDERED.

11 Date: August 7, 2013

12 By: 
13 HON. NANCY CASE SHAFFER
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA (UNLIMITED JURISDICTION)

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) PLAINTIFF'S OPPOSITION TO
	) DEFENDANTS' MOTION FOR
v.	) PROTECTIVE ORDER (BY FAX)
)
SPIRE VISION LLC <i>et al</i>,	) Date: August 21, 2013
) Time: 3:30 p.m.
Defendants.) Judge: Hon. Nancy Case Shaffer
) Dept: 18

[Caption Only]

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I. INTRODUCTION

Defendants Spire Vision LLC and its related companies and “brands” (collectively, “Spire Vision”) and Accelerize New Media Inc.¹ (“Accelerize”) are seeking a protective order from voluminous discovery that Spire Vision has inflicted upon itself. More specifically, although the 10 Spire Vision companies treat themselves collectively in pleadings and motions – including *this* Motion for Protective Order – they refused to allow Plaintiff Christopher Wagner (“Wagner”) to treat them collectively for discovery purposes, insisting that Wagner propound discovery to each Defendant. If Spire Vision had agreed to respond collectively, it would have eliminated 90% of the discovery and nearly all the discovery requests that Spire Vision complains are burdensome and harassing.

Furthermore, Wagner suggested various stipulations that would have significantly reduced the amount of discovery even *within* the remaining 10%.

In brief, Spire Vision is playing a corporate shell game amongst the 10 companies (and eight “brands”) and complaining that discovery is forcing Spire Vision to reveal all the shells at once. Spire Vision is using every conceivable tactic to delay and obstruct the discovery of highly relevant information. As such, the Court should order Spire Vision to provide substantive responses to all of the discovery requests at issue in this Motion.

II. FACTUAL BACKGROUND

Wagner sued Spire Vision and others for material violations of California’s anti-spam law, Business and Professions Code § 17529.5, as for failing to make required disclosures in its advertising as set forth by Business and Professions Code § 17538.5. *See* Verified Complaint, generally. There are 49 unlawful spams at issue constituting email advertising that promotes Spire Vision and/or was sent by Spire Vision to Wagner. Wagner has been unable to definitively determine which of the Spire Vision entities advertised in or sent the individual emails, due in no small part to Spire Vision’s deliberate blurring of corporate boundaries. For example:

- The *CobraHealthChoices.com* domain name is registered to SERVE CLICKS LLC, but the *CobraHealthChoices.com* website’s Terms of Use state that JUNIPER MARKETING LLC operates the website.

¹ Accelerize’s participation in the Motion for Protective Order is puzzling, since Wagner has not even served discovery on Accelerize.

- WAGNER received a spam advertising the *EveryDayFamily.com* website from the domain name *TheMagnify.net*, which is registered to YOURADSHERE at a box at a branch of The UPS Store in Rosemead, California. However, a graphic in the body of that same spam claims the spam was sent from 221 N. Hogan Street #386 in Jacksonville, Florida, which is an address claimed by both FUTURESDRIVE and PULLSMART.
- WAGNER received various spams identifying DIGITAL PUBLISHING CORPORATION as the advertiser, but when he clicked the links, he ended up at various websites, the domain names for which are registered to WARD MEDIA INC.

Verified Complaint at ¶ 32.

Given that there are (at least) 10 interrelated Spire Vision corporate entities involved (plus eight random word pairings that Spire Vision refers to as “brands”), Wagner’s attorneys knew that separate discovery would of necessity be extensive. For that reason, Wagner repeatedly offered to allow the Spire Vision entities to respond collectively to almost all of the discovery requests, before *and* after Wagner served his discovery. Declaration of Daniel Balsam (“Balsam Decl.”) at ¶ 2. Spire Vision admits this. Motion at 1:16-17. However, as Spire Vision also admits, it refused that offer... claiming on the one hand that each individual Defendant would respond to the discovery responses differently, preventing a collective response... while on the other hand seeking a protective order because the resulting discovery that *they insisted* that Wagner propound separately to each Spire Vision entity is “duplicative and burdensome.” Motion at 9:24-10:1.

III. DISCUSSION

A. Legal Standard

Code of Civil Procedure § 2017(a) governs the scope of discovery permissible under California law. It provides in pertinent part:

Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and

location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.

For discovery purposes, information is relevant if it “might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement.” Weil & Brown, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:66.1, p. 8C-1 (The Rutter Group 1996). Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. *Davies v. Superior Court*, 36 Cal. 3d 291, 301 (1984). The phrase “reasonably calculated to lead to the discovery of admissible evidence” makes it clear that the scope of discovery extends to any information that reasonably might lead to other evidence that would be admissible at trial. “Thus, the scope of permissible discovery is one of reason, logic and common sense.” Weil & Brown at ¶ 8:67, p. 8C-2. These rules are applied liberally in favor of discovery. *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 790 (1982).

B. By Refusing Wagner’s Offer to Treat the Spire Vision Companies Collectively for Discovery Purposes and Refusing to Enter Into any Stipulations, Spire Vision Chose to Submit to Voluminous Discovery

Spire Vision claims that it felt “compelled to refuse” Wagner’s request to treat them collectively, “concerned with how they would provide a collective response to requests regarding multiple emails for which everyone was not even allegedly responsible.” Motion at 3:23-25. In a way this makes the point – Spire Vision entities have made this amount of discovery necessary because they are not even clear amongst themselves about who sent or was advertised in which email.

Wagner explained repeatedly that if *any* entity would admit to a question, then the collective response would be “admit,” and if *no* entity would admit, then the collective response would be “deny.” Spire Vision’s attorney Leeor Neta claimed that he didn’t understand this. Balsam Decl. at ¶ 3. Of course, nothing prohibits one or more Spire Vision entities from providing a more detailed response to any particular question, if necessary. Moreover, since all of the companies are “affiliated,” Motion at 3:22, if this Action results in a monetary judgment in Wagner’s favor, presumably the entities could allocate that judgment amongst themselves.

Spire Vision repeatedly cites the 6,155 discovery requests Wagner propounded for the proposition that the number *itself* proves that the discovery is burdensome and harassing. But, that number is spread over eighteen separate (but related) Spire Vision companies and “brands.”

Even by Spire Vision's own count, each company/brand received only 23 form interrogatories. Wagner propounded 241 special interrogatories to each of nine Spire Vision companies and 244 to On Demand Research LLC. Wagner propounded 248 requests for admission to each of nine Spire Vision companies and 260 to On Demand Research LLC. Wagner propounded 47 requests for production of documents to each of nine Spire Vision companies and 52 to On Demand Research LLC. Balsam Decl. at ¶ 4. The different counts undermines Spire Vision's attorney Leeor Neta's claim that "*No* effort was made to tailor each request to each Defendant." Motion at 6:8-9 (emphasis added). Wagner *did*, in fact, tailor specific questions for On Demand Research LLC. But he could not tailor specific questions for the other nine companies because he does not know which company is responsible for which spams. This is *why* Wagner needs the discovery – to figure out who did what. *Of course* the discovery is duplicative between (although not within) the Spire Vision companies.

Given that there are 49 spams at issue in this Action, and it is unclear which Spire Vision entity advertised in/sent which emails, the discovery to each individual Defendant is not unduly burdensome. After all, Spire Vision is the one that refused Wagner's offer to provide a collective response.

Spire Vision claims that in his May 6 email, Wagner's attorney Daniel Balsam suggested that the discovery could be reduced by "NINETY PERCENT" if Defendants provided a collective response. Mr. Balsam also suggested that a collective response would eliminate the need for a response to 170 – or less than 3% – of the whole volume, and perhaps more, but provided no details. Motion at 6:19-24. This statement is false in two separate ways. First, as described above, a collective response means that 10 corporate entities could have provided a single *one* set of responses, eliminating *nine* sets of responses to special interrogatories, requests for admission, and requests for production of documents... a 90% reduction. Second, Balsam *did* provide details. Balsam identified four stipulations that would have reduced the need for many questions even *within* the one remaining set of discovery:

If you'll stipulate that Wagner did NOT give direct consent to any Spire Vision company or any of its advertising clients, that would eliminate a lot of questions about direct consent.

A stipulation that Spire Vision (collectively) owns and operates a certain list of domain names would eliminate a lot of SROGs.

A stipulation that none of the "brands" (Achieve Opportunities, etc.) are readily traceable to any Spire Vision entity would remove a number of questions.

A stipulation that Spire Vision does not target its advertising would remove a number of questions about targeting, criteria, etc.

Balsam Decl. at ¶ 5 and Ex. A. As shown, Wagner offered Spire Vision the means to easily eliminate more than 90% of the discovery, but Spire Vision rejected the offer. Spire Vision claims that a collective response is “impossible,” Motion 6:8. However, as noted throughout the Motion and Neta’s supporting declaration, the Spire Vision entities have no problem collectively objecting to the discovery requests. If they can collectively litigate, they can collectively respond to discovery.

Spire Vision makes false assumptions and engages in gross exaggeration when it claims that it would take a lawyer working full-time six months to respond to Wagner’s discovery. Motion at 9:17-20. First, Spire Vision has always had it within its power to reduce the discovery by 90%. Second, even *if* each Spire Vision company responded individually, in most cases an answer could be copied-and-pasted into the other companies’ responses... taking mere seconds, not 10 minutes. As for requests for admissions, it is likely one company would respond “admit” and nine would respond “deny”... again, taking mere seconds, not 10 minutes.

C. Wagner’s Discovery Seeks Highly Relevant Information

Spire Vision makes a conclusory statement in the Motion that

Upon review, it became clear that most of the requests had little direct connection to the elements of the Plaintiff’s causes of action, i.e. whether the emails at issue contain unauthorized third-party domain names; falsified, misrepresented, or forged header information; or objectively and materially misleading subject lines. Most of the requests failed to address the matter of direct consent to receive the emails, as well as Defendants’ efforts to effectively prevent unsolicited commercial email advertisements.

Motion at 4:2-8. Spire Vision takes a myopically narrow view of the scope of permissible discovery under California law, which permits discovery if the information “either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” Code Civ. Proc. § 2017(a). Here, the requests and interrogatories are highly calculated to lead to the discovery of admissible evidence.

1. The Number of Spams that Spire Vision Sent and/or Advertised In, and the Number of Email Addresses to Which Spire Vision Spams Were Sent, Are Relevant

Spire Vision claims that the number of email advertisements sent, and the number of email addresses to which the spams were sent, is not reasonably calculated to lead to the discovery of admissible evidence. However, both are relevant to the issues of whether Spire

1 Vision had effective policies and procedures to prevent advertising in unlawful spam and
 2 whether the recipients had given direct consent to Spire Vision and/or its advertisers to send
 3 them commercial email advertisements.

4 ***2. The Amount of Money Received from Advertising Clients is Relevant***

5 The amount of money each Spire Vision company received from advertising clients is
 6 relevant to the issue of damages. It is also relevant to the identities of DOE Defendants, because
 7 Spire Vision is playing a corporate shell game. How much money each entity received from
 8 unsolicited commercial email advertisements is relevant to whether each one is or was properly
 9 capitalized. In fact, in some cases, it appears that one Spire Vision entity is sending spams
 10 advertising a different Spire Vision entity, suggesting that the entities might not be following
 11 proper corporate formalities, lending support to Wagner's belief that the Spire Vision companies
 12 are all alter-egos of each other and under common control.

13 ***3. The Consideration Each Spire Vision Company Received for Wagner's Email
 14 Addresses is Relevant***

15 The consideration received in exchange for Wagner's email addresses is relevant to the
 16 issue of direct consent, as it provides relevant information as to how Spire Vision actually
 17 obtained Wagner's email addresses and from whom, potentially identifying DOE defendants and
 18 shed light as to if there actually was direct consent. Knowing how Spire Vision got Wagner's
 19 email addresses also provides relevant information on whether Spire Vision had effective
 20 policies and procedures to prevent the sending of unsolicited commercial emails. The value of
 21 Wagner's email addresses may also lead to admissible evidence relating to Wagner's damages.

22 ***4. Each Spire Vision Company's Corporate Structure and Affiliation With the Others
 23 is Relevant***

24 Given that 10 Spire Vision entities (excluding the "brands") are related to each other in a
 25 corporate sense, knowing how each entity is structured and its relation to the others is necessary
 26 for an understanding of which of the various entities are liable for the unlawful conduct. The
 27 information is also relevant to the issue of damages and whether Spire Vision uses multiple
 28 corporate identities to swap assets amongst its various companies and attempt to avoid liability
 as they send and advertise in unlawful spams.

29 ***5. Spire Vision's Brands, Addresses and Domain Names are Highly Relevant***

30 Spire Vision claims the requests relating to their brand names, addresses, and domain
 31 names, and explanations as to how they facially identify any Spire Vision companies is not
 32

1 reasonably calculated to lead to the discovery of admissible evidence. Motion 4:15-17. This
 2 claim is meritless, because

3 header information in a commercial e-mail is falsified or misrepresented for
 4 purposes of section 17529.5(a)(2) when it uses a sender domain name that neither
 5 identifies the actual sender on its face nor is readily traceable to the sender using a
 publicly available online database such as WHOIS.

6 *Balsam v. Trancos Inc. et al*, 203 Cal. App. 4th 1083, 1101 (1st Dist. 2012), *petition for review*
 7 *denied*, 2012 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S.
 8 LEXIS 8423 (U.S. Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S.
 9 Jan. 7, 2013).

10 Therefore, Spire Vision's pattern and practice of deliberately registering domain names
 11 so that recipients cannot trace them to any real Spire Vision entity is highly relevant as to
 12 violations of California's anti-spam statute. Wagner argues that when one of the Spire Vision
 13 entities – he cannot determine which one (or ones) – sends a spam from, to name but one
 14 example, the domain name *eproductiveblog.com*, which does not identify any Spire Vision entity
 15 on its face and which is registered to "AgreeWizard," claiming its address to be a box at a branch
 16 of The UPS Store in Sterling Heights, Michigan – a state in which Spire Vision has no physical
 17 presence – such practice violates the statute because it prevents him from readily identifying any
 18 of the actual Spire Vision companies by a Whois query. *Trancos, supra*.

19 Wagner also argues that when Spire Vision registers *all* of its domain names in such a
 20 manner, it undermines a defense of "practices and procedures to prevent advertising in unlawful
 21 spam."

22 **6. Spire Vision's Alleged Efforts to Tailor Marketing Campaigns to Its Advertising**
 23 **Client is Related to the Direct Consent Requirement**

24 Spire Vision's alleged efforts to tailor marketing campaigns to the needs of its advertising
 25 clients are relevant to Spire Vision's or the other advertisers' claim of direct consent from the
 26 recipients of their email advertisements, and whether they had effective policies and procedures
 27 to prevent the sending of unlawful spams.

28 For example, EverydayFamily Inc. claims that its website *EverydayFamily.com* is
 29 a family driven website – in every sense – featuring a growing community of
 30 people who share in the everyday experience of parenting. We strive to be an
 31 online home for experts and parents who have advice and information to share, as
 32 well as those who are seeking guidance and support as they move through their
 family's journey, from pre-conception to preschool and beyond.

Welcome to EverydayFamily.com!, <http://www.everydayfamily.com/about> (last visited August 7, 2013). Wagner is not a parent and has no plans to be a parent in the foreseeable future. The fact that Spire Vision sent a spam advertising *EverydayFamily.com* to Wagner undermines Spire Vision's claim that it provides tailored marketing campaigns for its clients *and* its claim that Wagner gave direct consent to send him commercial email.

7. *Contracts, Communications, Checks and Electronic Payments Between the Spire Vision Entities are Relevant*

Again, since the Spire Vision companies are all related and treat themselves collectively except when responding to discovery, Wagner must determine the specific corporate relationships. This is what discovery is *for*. Moreover, this information, to the extent it is not covered by any privilege, is relevant to who may have sent each of the emails to Wagner and whether there are grounds to pierce the corporate veil.

8. *Wagner Did Not Needlessly Duplicate Requests by Using Synonyms*

Spire Vision gripes that Wagner asked each entity the following allegedly duplicative special interrogatories #14-16 (emphasis added):

If you contend that the damages alleged in Plaintiff Wagner's Verified Complaint were not caused by you, but were caused by one or more third parties whose activities were not *approved* by you, state all facts that support your contention (including identifying those third parties).

If you contend that the damages alleged in Plaintiff Wagner's Verified Complaint were not caused by you, but were caused by one or more third parties whose activities were not *ratified* by you, state all facts that support your contention (including identifying those third parties).

If you contend that the damages alleged in Plaintiff Wagner's Verified Complaint were not caused by you, but were caused by one or more third parties whose activities were not *controlled* by you, state all facts that support your contention (including identifying those third parties).

Motion at 4:24-5:1. But the words "approved," "ratified," and "controlled" are *not* synonyms. Spire Vision might or might not *approve* certain From Names or Subject Lines before spams are sent, and might or might not *ratify* them after the fact, and neither approval nor ratification has anything to do with whether or not Spire Vision actually *controlled* its third party marketing agents.

Moreover, if Wagner had attempted to put those three terms into a single interrogatory, Spire Vision could have objected to a compound request, and it would have been correct to do so.

Spire Vision also complains that Wagner asked each entity allegedly duplicative requests for admissions #7-12:

REQUEST FOR ADMISSION #7

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS that you sent in 2012 were sent to people who did not agree to receive them.

REQUEST FOR ADMISSION #8

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS that you sent in 2012 were sent to people who did not give you DIRECT CONSENT to send them.

REQUEST FOR ADMISSION #9

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS that you sent in 2012 were sent to people who did not give your advertising clients DIRECT CONSENT to send them.

REQUEST FOR ADMISSION #10

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS sent by third parties in 2012 in which you advertised were sent to people who did not agree to receive them.

REQUEST FOR ADMISSION #11

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS sent by third parties in 2012 in which you advertised were sent to people who did not give you DIRECT CONSENT to send them.

REQUEST FOR ADMISSION #12

Admit that at least some of the COMMERCIAL EMAIL ADVERTISEMENTS sent by third parties in 2012 in which you advertised were sent to people who did not give the third parties DIRECT CONSENT to send them.

Perhaps if Spire Vision and its attorneys had read the questions more carefully, they would have realized that these are *not* duplicative. RFAs #7-9 target commercial emails sent by *Spire Vision*. RFA #7 asks if the recipients agreed – implicitly to *anyone* – to receive commercial emails. RFA #8 asks if the recipients gave *Spire Vision* “direct consent” to send them commercial email. RFA #9 asks if the recipients gave Spire Vision’s *advertising clients* “direct consent” to send them commercial email. In contrast, RFAs #10-12 target commercial emails in which Spire Vision advertised but that were sent by *third parties*.

9. Compound Requests Are the Result of Spire Vision’s Refusal to Identify Which Entity(-ies) Sent Which Spams

Spire Vision complains that numerous discovery requests are “compound.” Motion at 5:1-4. However, the use of the word “every” does not make a question compound. Indeed,

1 because the use of the “every” occurs in a dependent clause each time it occurs, Spire Vision
 2 might not need to answer at all. If Spire Vision insists that *every* single commercial email
 3 advertisement that it sent and/or advertised in complies with the law (despite specific examples
 4 set forth in the Verified Complaint and in the discovery requests themselves), then Wagner is
 5 entitled to know the basis for that belief.

6 Moreover, Spire Vision refuses to identify which entity sent which emails. Additionally,
 7 by grouping some requests, Spire Vision is still able to answer common issues in singular
 8 discovery requests rather than numerous duplicative requests of which it complains elsewhere in
 9 the Motion. Spire Vision is complaining on one hand that discovery requests are compound
 10 while at the same time complaining that they are also duplicative. In effect, Spire Vision wants
 11 to have its cake and eat it too.

12 ***10. “Identify” As Used in the Requests for Admissions Is Sufficiently Clear***

13 Spire Vision asserts that the request to “identify” frustrates its responses. Motion at 5:6.
 14 However, the use of “identify” in those requests does no such thing. “Identify” addresses one of
 15 the central issues in this case: whether the emails that Spire Vision (or others) sent to Wagner are
 16 misleading and deceptive by failing to identify the actual sender of the email or the advertiser of
 17 the email, i.e. which Spire Vision entity or its third-party publishers.

18 Spire Vision is merely trying to avoid responding to discovery that it understands
 19 perfectly well because, as it has retained competent lawyers, experienced at defending
 20 spammers, Balsam Decl. at ¶ 6, it knows that these discovery items address the central issue of
 21 liability in this Action. In fact, Spire Vision’s understanding is evidenced by its inability to
 22 explain how the discovery questions “frustrate a response.” Motion at 5:5-6.

23 ***11. “Sending Commercial Emails to [Plaintiff]” As Used in the Form Interrogatories*** 24 ***Is Not Vague***

25 Spire Vision claims that the form interrogatories are “impossible to answer” because the
 26 incident “[s]ending of commercial emails to [Plaintiff]” is vague. Motion at 5:8-11. However,
 27 Wagner has filed a Verified Complaint that clearly sets forth the facts and legal theories of his
 28 case. He has also provided to Spire Vision the emails at issue in this case. As such, Spire
 29 Vision, who specializes in email marketing, has the capacity to understand the term “[s]ending of
 30 commercial emails to [Plaintiff]” and the ability to answer the form interrogatories, given the
 31 legal and factual issues involved in the Action.
 32

1 ***12. Spire Vision's Claim that Third Parties Have Relevant Information is Insufficient***
 2 ***Grounds to Refuse to Respond***

3 Spire Vision claims that information responsive to some of the discovery requests is in
 4 the hands of third parties. Motion at 5:11-16. However, the California Discovery Act considers
 5 such a contingency at Code of Civil Procedure § 2031.230, which provides in pertinent part:

6 A representation of inability to comply with the particular demand for inspection,
 7 copying, testing, or sampling shall affirm that a diligent search and a reasonable
 8 inquiry has been made in an effort to comply with that demand. This statement
 9 shall also specify whether the inability to comply is because the particular item or
 10 category has never existed, has been destroyed, has been lost, misplaced, or
 11 stolen, or has never been, or is no longer, in the possession, custody, or control of
 the responding party. *The statement shall set forth the name and address of any
 natural person or organization known or believed by that party to have
 possession, custody, or control of that item or category of item.* (emphasis added).

12 Therefore, to the extent relevant information is in the possession of third parties, Spire Vision
 13 has a duty to conduct a diligent search for such information, and if it still cannot comply, Spire
 14 Vision must state the name and address – must *identify* – anyone that the Spire Vision entities
 15 (either individually or collectively) knows or believes to have possession of that item.

16 ***13. Wagner Only Sought the Identity of Employees with Relevant Information***

17 Spire Vision claims that Wagner's special interrogatories seek the names and contact
 18 information of nearly all of the Defendants' employees. Motion at 5:17-19. However,
 19 interrogatories 208-214 only seek the identity of witnesses with information about the emails
 20 sent to Wagner. These individuals will have relevant information on Spire Vision's practices
 21 and procedures to prevent the sending of unsolicited commercial emails, whether Wagner gave
 22 direct consent to receive commercial emails, how Spire Vision obtained Wagner's email address,
 23 who wrote the allegedly unlawful From Names and Subject Lines, and who registered the
 24 domain names used to send the spams. All these issues are highly relevant to Wagner's claims
 25 and all of these witnesses, by definition, have that information. If nearly every employee has
 26 knowledge about Spire Vision's use of email advertising, Wagner has all the more right to learn
 27 the identity of material witnesses.

28 ***14. How Spire Vision Marketed Its "Brands" is Relevant to Its Misleading and***
 29 ***Deceptive Practices***

30 Spire Vision states that Wagner has "fixed upon each Defendants' [sic] efforts to market
 31 or promote another Defendant's brand, e.g. 'State all actions you have taken to promote
 32 'Achieve Opportunities' as a brand.'" Motion at 5:19-23.

1 The fact is, Spire Vision does not register the domain names it uses to send spams to any
 2 of the actual corporate entities. Instead, Spire Vision registers the domain names to its “brands”:
 3 AchieveOpportunities, AgreeWizard, FurturesDrive [sic], JunctionLights, Opportunity Central,
 4 PathsDirect, PullSmart, YourAdsHere.

5 Serious marketers take their brands seriously. For example, in 1992-1993, the Procter &
 6 Gamble Company advertised its brand “Crisco Shortening” and conducted research to determine
 7 consumer perceptions of Crisco. A person could easily determine that Crisco Shortening was a
 8 P&G brand simply by looking at the packaging or a print advertisement. Balsam Decl. at ¶ 7.

9 In contrast, Wagner alleges that:

- 10 • Spire Vision registers its spamming domain names to two random words slapped
 11 together that it calls a “brand.”
- 12 • A member of the public cannot readily trace the “brands” back to any actual Spire
 13 Vision company.
- 14 • Spire Vision has not promoted its brands or done anything to differentiate them.

15 In the marketing world, *brand* has a meaning, and Wagner is entitled to explore whether
 16 AchieveOpportunities, AgreeWizard, FurturesDrive [sic], JunctionLights, Opportunity Central,
 17 PathsDirect, PullSmart, and YourAdsHere are really brands, as Spire Vision has claimed., or if
 18 they are just two random words thrown together solely for the purposes of r egistering domain
 19 names in a manner that prevents a person from tracing the “brands” back to any actual Spire
 20 Vision company by a Whois query.

21 ***15. Spire Vision Raised Issues and Made Claims about Wagner’s Attorney Daniel***
 22 ***Balsam; Wagner is Entitled to Discovery About the Bases for Spire Vision’s Claims***

23 After Spire Vision improperly removed this Action to federal court, Wagner filed a
 24 Motion to Remand. When Spire Vision filed its Opposition, it referred to *Balsam* – Wagner’s
 25 attorney and not a party – throughout, and alleged that

26 “The present lawsuit is simply the latest filed by Daniel Balsam (“Balsam”)—on
 27 behalf of his proxy clients—against the Spire Vision Family of companies, brands
 and affiliates.” Opposition at 1:2-4.

28 “Wagner Is A Mere Proxy For His Attorney Daniel Balsam. . . . For ten years,
 29 Balsam has threatened the email marketing industry and wasted invaluable court
 30 resources on his specious complaints about spam. (Id.) In either his name or the
 31 names of his proxy clients, Balsam has bilked over \$1 million in court
 32 judgments.” Opposition at 2:5-8.

1 “At its heart, this case is just one chapter in an extended dispute between Balsam
2 and the Spire Vision Family.” Opposition at 8:4-5.

3 “Because Balsam knew that he could never win in federal court, he attempted to
4 craft the present lawsuit in a way that might avoid removal. He chose again to
5 target the Spire Vision Family.” Opposition at 8:11-13.

6 Balsam Decl. at ¶ 8 and Ex. B.

7 Spire Vision essentially accuses Wagner of being a mindless pawn of his attorney
8 Balsam. Therefore, Wagner believes that Spire Vision might attempt to challenge his standing to
9 bring this lawsuit. Indeed, Spire Vision has already alleged that Wagner has unclean hands.
10 Spire Vision made these accusations, and Wagner is entitled to explore Spire Vision’s bases – if
11 any exist – for such claims.

12 ***16. Defendants Are Not Entitled to a Protective Order or a Stay of Discovery***

13 Spire Vision requested a stay of discovery pending the resolution of its Demurrer.
14 However, Spire Vision already secured ample time to gather the relevant information by filing an
15 improper removal to federal court, buying additional time to which it is not entitled.
16 Additionally, while this Action was still in the United States District Court for the Northern
17 District of California, Spire Vision answered the Complaint, precluding it from filing a Demurrer
18 in this Action. Code Civ. Proc. § 430.90. On August 7, this Court entered an Order overruling
19 the Demurrer. The issue of a stay is therefore moot.

20 ***17. Appointment of a Discovery Referee Would Waste Judicial Resources***

21 Spire Vision has engaged in a litigation strategy of obstruction and delay by improperly
22 removing this case to federal court, filing an improper Demurrer, and insisting on individual
23 discovery to each entity while simultaneously objecting to the volume of discovery. Spire
24 Vision is the party who is attempting to turn a straightforward civil case into a “complex
25 discovery nightmare,” Motion at 13:5, through its refusal to answer Wagner’s discovery and by
26 filing the instant meritless Motion for Protective Order.

27 Moreover, the *volume* of discovery does not automatically make the discovery *complex*.
28 Wagner concedes there is a significant amount of discovery, but that is the logical and
29 foreseeable result of 49 spams and 10 different Spire Vision companies, plus the eight “brands.”
30 None of Wagner’s questions are *complex*. Spire Vision is simply trying to stall and run up
31 Wagner’s costs.
32

1 This Court should order Spire Vision to respond collectively, or order each entity to
 2 respond on its own and stop complaining about the volume. If the Spire Vision companies can
 3 manage to collectively remove to federal court, answer, demurrer, and object to discovery, it
 4 should not be much additional effort to collectively respond to discovery.

5 ***18. Spire Vision's Attempts to Avoid Discovery Do Not Merit a Case Management***
 6 ***Order and Should Not Result In Relaxed Discovery Deadlines***

7 This case does not meet the exceptional circumstances criteria necessitating a case
 8 management order, as Spire Vision claims in the Motion at 14:2-24.

- 9 1. The subject matter of the Action is unlawful spamming in violation of Business &
 10 Professions Code § 17529.5, and failure to disclose the advertiser's real name and
 11 address in violation of Business & Professions Code § 17538.5. That does not make
 12 it complex.
- 13 2. There are 10 Spire Vision companies and eight "brands," but they are all affiliated.
 14 Motion at 3:22. They all retained the same counsel of record. They already filed
 15 numerous pleadings and motions (including this one) collectively, which should
 16 indicate that the issues among them can be managed collectively without any
 17 conflict of interest. If they can file motions collectively, they can respond to
 18 discovery collectively as well. *If* there are any issues of separate interest, the only
 19 place it could occur is between Spire Vision and Accelerize New Media Inc., and yet
 20 the same attorneys represent both.
- 21 3. This lawsuit is about unlawful spam, but it is *not* about technical labeling
 22 requirements, nor is it about non-commercial email "correspondence." Spire Vision's
 23 bald declaration that "the issues . . . are decidedly complex," Motion at 14:12-13,
 24 does not make it so. In fact, the issues are actually rather simple. Advertisers are
 25 strictly liable for advertising in unlawful spam, generic From Names and domain
 26 names registered so as to not be readily traceable violate Business & Professions
 27 Code § 17529.5, and Subject Lines claiming that people can receive gift cards by
 28 taking surveys without even hinting at any purchase requirements are false and
 29 misleading. To the extent that anything about this case might be "complex," it has
 30 solely been due to Spire Vision's actions to delay and obstruct, actions that could be
 31 and can be easily avoided.

- 1 4. Defendants EverydayFamily Inc. and Zulu Marketing LLC have been dismissed.
2 Balsam Decl. at ¶ 9.
- 3 5. The nature of the discovery is straightforward. Admittedly, the discovery is
4 voluminous, but that is a problem of Spire Vision's own making.
- 5 6. Spire Vision sets forth no facts explaining why trial will be lengthy.
- 6 7. There are no other actions or proceedings that may affect the case, other than the
7 rulings of two California Court of Appeal cases addressing Business & Professions
8 Code § 17529.5: *Balsam v. Trancos*, *supra*, and *Hypertouch v. ValueClick Inc.*, 192
9 Cal. App. 4th 805 (2d Dist. 2011). Although Spire Vision might wish it to be so, this
10 Court is not bound by decisions of the lower federal courts. *See, e.g., Kopp v. Fair*
11 *Political Practices Commission*, 11 Cal. 4th 607, 620 (1995); *People v. Crittenden*, 9
12 Cal. 4th 83, 120 (1994); *Courtney v. Waring*, 191 Cal. App. 3d 1434, 1440 (4th Dist.
13 1987).
- 14 8. Law and Motion will not be particularly difficult. This Court has already resolved
15 Spire Vision's Demurrer to the Complaint and Wagner's Motion for Sanctions.

16 **IV. CONCLUSION**

17 For the reasons stated above, Wagner respectfully requests that Defendants' Motion for
18 Protective Order be denied in its entirety, and that this Court order Spire Vision to respond to all
19 of Wagner's discovery requests at issue in this Motion.

20 THE LAW OFFICES OF DANIEL BALSAM

21
22 Dated: August 8, 2013



(by fax)

23 Daniel Balsam
24 Attorneys for Plaintiff Christopher Wagner
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Attorneys for Plaintiff Christopher Wagner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA (UNLIMITED JURISDICTION)

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) DECLARATION OF DANIEL BALSAM
	) IN SUPPORT OF PLAINTIFF'S
v.	) OPPOSITION TO DEFENDANTS'
	) MOTION FOR PROTECTIVE ORDER,
SPIRE VISION LLC <i>et al</i>,	) OR, IN THE ALTERNATIVE, FOR A
	) STAY IN DISCOVERY AND
Defendants.	) IMPLEMENTATION OF A CASE
	) MANAGEMENT ORDER (BY FAX)
)
	) Date: August 21, 2013
	) Time: 3:30 p.m.
	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

I, Daniel L. Balsam declare:

1. I am an attorney duly licensed to practice law in all courts of the State of California. I represent Plaintiff Christopher Wagner ("Wagner") in this Action. The following facts are based on my own personal knowledge. If called as a witness, I could and would testify competently to the declared facts under oath.

- 1 2. I repeatedly offered to allow the Spire Vision entities to respond collectively to almost all of the
2 discovery requests, before *and* after I served Wagner's discovery.
- 3 3. Regarding collective responses, I explained repeatedly that if *any* entity would admit to a question,
4 then the collective response would be "admit," and if *no* entity would admit, then the collective
5 response would be "deny." Spire Vision's attorney Leeor Neta claimed that he didn't understand
6 this.
- 7 4. I propounded 241 special interrogatories to each of nine Spire Vision companies and 244 to On
8 Demand Research LLC. I propounded 248 requests for admission to each of nine Spire Vision
9 companies and 260 to On Demand Research LLC. I propounded 47 requests for production of
10 documents to each of nine Spire Vision companies and 52 to On Demand Research LLC.
- 11 5. Exhibit A is a true and correct copy of an email I sent to Leeor Neta on May 6, 2013 stating
12 that collective responses and stipulations could drastically reduce the amount of discovery.
- 13 6. I have personal knowledge that the firm of Newman Du Wors LLP has defended spammers
14 in numerous federal and state Actions, and has represented numerous spammers in
15 negotiations that did not result in litigation.
- 16 7. In 1992-1993, I was an Assistant Account Executive at Grey Advertising (New York), working in
17 the Procter & Gamble group on the Crisco Shortening account. I have personal knowledge that
18 Grey and P&G conducted research to determine consumer perceptions of Crisco. I have personal
19 knowledge that a person could easily determine that Crisco Shortening was a P&G brand simply by
20 looking at the packaging or a print advertisement.
- 21 8. Exhibit B is a true and correct copy of several pages from the Opposition to Wagner's
22 Motion to Remand that the Spire Vision entities (collectively) filed after improperly
23 removing this Action from this Court to the U.S. District Court for the Northern District of
24 California.
- 25 9. Defendants EverydayFamily Inc. and Zulu Marketing LLC have been dismissed.

26
27 I declare under penalty of perjury under the laws of the State of California that the foregoing is
28 true and correct, and that this Declaration was executed in San Francisco, California, on August
29 8, 2013.

30 

(by fax)

31 DANIEL L. BALSAM

Exhibit A

Dan Balsam

From: Dan Balsam [legal@danbalsam.com]
Sent: Monday, May 06, 2013 5:11 PM
To: 'Leeor Neta'; 'John Du Wors'
Cc: 'twalton@twalton.net'; 'Keith Scully'
Subject: Wagner's discovery to Spire Vision

Mr. Neta,

On our call last Friday, you complained that Wagner's discovery to Spire Vision is excessive, duplicative, burdensome, etc.

However, this is a problem entirely of Spire Vision's own making.

First, Spire Vision chose to create at least 10 companies, at least 10 brands, and dozens of domain names. That necessitated extensive discovery, and we strongly believe that every question propounded is appropriate.

Second, you rejected our repeated requests to treat the Spire Vision entities collectively for discovery purposes, even though they have treated themselves collectively in pleadings and motions.

Nevertheless, we again offer your clients the opportunity to provide one set of responses to RFAs, SROGs, and RFPDs on behalf of all Spire Vision entities. That would immediately reduce your required responses by NINETY PERCENT. It would ALSO reduce the discovery WITHIN the one remaining set, because it would make unnecessary questions such as, for example, connections between the companies and which company owns certain properties (SROGs #29-31, 163-168, 223-240, and perhaps more).

We could also consider certain stipulations that would remove entire categories of questions. On the call, I posed a hypothetical that if you'll stipulate that Wagner did NOT give direct consent to any Spire Vision company or any of its advertising clients, that would eliminate a lot of questions about direct consent. Other hypothetical possibilities include:

- * A stipulation that Spire Vision (collectively) owns and operates a certain list of domain names would eliminate a lot of SROGs.
- * A stipulation that none of the "brands" (Achieve Opportunities, etc.) are readily traceable to any Spire Vision entity would remove a number of questions.
- * A stipulation that Spire Vision does not target its advertising would remove a number of questions about targeting, criteria, etc.

We could probably come up with more examples too. Note, we are NOT committing to any of these at this moment without our client's approval. They're merely hypotheticals; food for discussion.

Finally, we might be open to extending your time to respond, so long as we agree that the responses will be substantive, and not merely objections.

Please let us know your thoughts.

=====
Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

8/8/2013

Exhibit B

1 John Du Wors, State Bar No. 233913
john@newmanlaw.com
2 Leeor Neta, State Bar No. 233454
3 leeor@newmanlaw.com
NEWMAN DU WORS LLP
4 1201 Third Avenue, Suite 1600
5 Seattle, WA 98101
Telephone: (206) 274-2800
6 Facsimile: (206) 274-2801

7 Attorneys for Defendants
8
9

10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11

12 Christopher Wagner, an individual,

13 Plaintiff,

14 v.

15 Spire Vision LLC, a Delaware limited liability
16 company, et al.,

17 Defendants
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No. 13-cv-00054-YGR

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO
REMAND AND REQUEST FOR
COSTS**

The Honorable Yvonne G. Rogers

Date: March 5, 2013

Time: 2:00 pm

Location: Courtroom 5, 2nd Floor

I. INTRODUCTION

The present lawsuit is simply the latest filed by Daniel Balsam (“Balsam”)—on behalf of his proxy clients—against the Spire Vision Family of companies, brands and affiliates. Last year when Balsam made identical claims against the Spire Vision Family, the Honorable Phyllis J. Hamilton of this Court applied Ninth Circuit precedent to dismiss the claims with prejudice, finding that they were pre-empted by the federal CAN-SPAM Act. The present lawsuit—on behalf of Christopher Wagner—presents identical claims. To avoid the preclusive effect of Judge Hamilton’s ruling, Balsam filed in state court and joined three sham California defendants. But there is no possibility that Wagner will recover against two of these defendants, one of which was dismissed with prejudice well before removal. Claims against the other sham California defendant—LifeScript, Inc.—bear no connection to the other claims and parties and prove that LifeScript was fraudulently misjoined. It is clear, moreover, that the amount in controversy already exceeds \$75,000. All of the identifiable co-defendants have either joined in the removal or have been dismissed with prejudice. Remand is inappropriate.

While Balsam also seeks the fees and costs associated with seeking remand, fees are only awarded where there is no objectively reasonable ground for removal. Balsam refused to meet and confer regarding the grounds for removal. There is simply no basis for awarding fees and costs here.

Defendants’ Opposition to Plaintiff’s Motion for Remand and Request for Costs is supported by the accompanying Declaration of Daniel Berger, dated February 8, 2013 (“BD”), the accompanying Declaration of John Du Wors, dated February 8, 2013 (“DD”), the accompanying Declaration of Leeor Neta, dated February 8, 2013 (“ND”), the accompanying Declaration of Lindsey Rowson, dated February 8, 2013 (“RD”), the accompanying Declaration of Damon Stein, dated February 8, 2013 (“SD”), and the exhibits thereto submitted herewith.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Wagner Is A Mere Proxy For His Attorney Daniel Balsam.

California Business and Professions Code, Section 17529.5¹—California’s anti-spam statute—is the cornerstone of Daniel Balsam’s (“Balsam”) very lucrative practice. (DD, ¶ 2.) For ten years, Balsam has threatened the email marketing industry and wasted invaluable court resources on his specious complaints about spam. (Id.) In either his name or the names of his proxy clients, Balsam has bilked over \$1 million in court judgments. (Id.)

B. This Court Dismissed Claims Identical To Those Brought By Balsam On Behalf Of A Similarly Situated Plaintiff.

Spire Vision is a family of companies, one or more of which create and/or distribute email internet advertisements. (BD, ¶ 2.) This family includes XL Marketing Corp.; Mediactivate LLC; Prime Advertisers LLC; Serve Clicks LLC; Spire Vision Holdings, Inc.; Spire Vision, LLC; Ward Media, Inc.; and several other brands and affiliates, together with Achieve Opportunities, AgreeWizard, Digital Publishing Corporation, Juniper Marketing LLC, On Demand Research LLC, Opportunity Central, Paths Direct and Pullsmart (“the Spire Vision Family”). (Id.) Advertising emails sent by the Spire Vision Family are permission-based, and the Spire Vision Family has strict guidelines regarding direct consent. (Id.)

The Spire Vision Family is well-acquainted with Balsam. Between March 2011 and May 2011, Balsam sent a series of demand letters to the Spire Vision Family. (DD, ¶ 3.) In these letters, Balsam alleged that his client and wife, Cathy Riley, was due \$118,000 in statutory damages because she received a series of advertising emails for which the Spire Vision Family was allegedly responsible. (Id.) The letters attempt to extort money from the Spire Vision Family by threatening litigation pursuant to Section 17529.5. (Id.) Refusing to be falsely accused and held hostage by Balsam, the

¹ Hereinafter, all section references are to the California Business and Professions Code.

III. DISCUSSION

A. **Balsam Filed In State Court For The Sole Purpose Of Avoiding The Preclusive Effect Of Judge Hamilton's Ruling In A Nearly Identical Case.**

At its heart, this case is just one chapter in an extended dispute between Balsam and the Spire Vision Family. In the last chapter, Judge Hamilton of this Court dismissed with prejudice identical claims brought by Balsam on behalf of a similarly-situated plaintiff. (DD, ¶ 6, Ex. B.) Her ruling applied clearly established Ninth Circuit precedent that the federal CAN-SPAM Act preempts complaints regarding advertising emails that fail to allege reliance or compensatory damages. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1050 (9th Cir. 2009). (Id.)

Because Balsam knew that he could never win in federal court, he attempted to craft the present lawsuit in a way that might avoid removal. He chose again to target the Spire Vision Family. But this time, Balsam added several California “middleman” defendants—Accelerize New Media, Inc.; Adconion Media, Inc.; and LifeScript, Inc.—under a joint and several liability doctrine that finds no support in the law. (See Section C, *infra*.) He also fraudulently misjoined LifeScript, Inc. as an advertiser defendant, despite the fact that the claims against LifeScript have no relation to the other defendants. (See *id.*) And he prayed for liquidated damages and fines in the amount of only \$64,000—while obscuring his prayer for attorneys’ fees, costs, and punitive damages that are certain to raise the amount in controversy over the \$75,000 threshold.

This Court should see through Balsam’s attempts to flout Judge Hamilton and avoid the preclusive effect of her ruling. Defendants have already moved to dismiss the new lawsuit under the same arguments presented to Judge Hamilton. (See Dkt. No. 18.) The Court should take this opportunity to refuse remand, hear the motion to dismiss, and demonstrate the impropriety of evading the rulings of this Court.

B. **The Failure Of All Defendants To Consent To Removal Is A Mere Procedural Defect That Does Not Require Remand.**

Wagner complains that seven defendants were omitted from the notice of removal.

<i>Attorney or Party Without Attorney</i> Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 Telephone No.: 415-869-2873 Fax No.: 415-869-2873 Attorney for: Plaintiff Christopher Wagner		
<i>Insert name of Court, and Judicial District and Branch Court:</i> Superior Court of California, County of Sonoma Civil and Family Law Courthouse 3055 Cleveland Avenue Santa Rosa, CA 95403		
<i>Plaintiff/Petitioner:</i> Christopher Wagner <i>Defendant/Respondent:</i> Spire Vision LLC et al		<i>Case Number:</i> SCV-252580
<p style="text-align: center;">PROOF OF SERVICE – CIVIL</p> Check method of service (<i>only one</i>): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		<i>Judge:</i> Shaffer <i>Courtroom:</i> 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. My residence or business address is:
The Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131
4. On *(date)*: August 8, 2013 I served the following **documents** *(specify)*:

Plaintiff's Opposition to Defendants' Motion for Protective Order, Declaration of Daniel Balsam
5. I served the documents on the person or persons below, as follows:
 - a. Name of person served:
John Du Wors – attorney for Spire Vision entities, Accelerize New Media Inc.
 - b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*
Business or residential address where person was served:
Newman Du Wors LLP, 1201 Third Avenue, Suite 1600, Seattle, WA 98101
6. The documents were served by the following means *(specify)*:
 - c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Date: August 8, 2013

Daniel L. Balsam

Type or Print Name of Declarant

Daniel L Balsam By Fax

Signature of Declarant

PROOF OF SERVICE – CIVIL

Box 145**ENDORSED
FILED****AUG 14 2013****SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA****COPY**

John Du Wors, State Bar No. 233913
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NEWMAN DU WORS LLP
1201 Third Avenue, Suite 1600
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Attorneys for Defendants

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA**

By Fax

Christopher Wagner, an individual,

Civil Case No. SCV-252580

Plaintiff,

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER OR, IN THE
ALTERNATIVE, FOR A STAY OF
DISCOVERY AND
IMPLEMENTATION OF A CASE
MANAGEMENT ORDER**

v.

Spire Vision LLC, a Delaware limited
liability company, et al.,

Defendants.

Hearing Date: August 21, 2013
Hearing Time: 3:30 p.m.
Dept. No. 18
Judge: Hon. Nancy Case Shaffer

I. INTRODUCTION

Plaintiff Christopher Wagner copied and pasted **6,155 discovery requests** and demands that 18 distinct Defendants bear the impossible burden of responding to every single one. Plaintiff cites no authority—in any matter, let alone complex litigation—for such voluminous discovery. While Plaintiff suggests that all 18 Defendants should craft a collective response to each request, he concedes that this will add to their burden. (Opposition at 3:25-27.) Ultimately, Plaintiff claims that he “knows the facts”—indeed, the emails speak for themselves—and the requests have been crafted in the most burdensome manner possible. If this matter is as complex as his discovery suggests, there

1 is no merit to his claim that a discovery referee and case management order are not
 2 needed. It is hard to find a better example of the misuse of discovery as a weapon to wage
 3 litigation. Defendants' motion for a protective order should be granted.

4 II. DISCUSSION

5 A. Plaintiff Does Not Dispute That The California Supreme Court And Courts 6 of Appeal Limit Voluminous And/Or Harassing Discovery.

7 In their opening brief, Defendants explained that the California Supreme Court
 8 and Courts of Appeal have condemned requests that are harassing, unduly burdensome,
 9 unreasonably cumulative, duplicative or poorly defined. (Motion at 8, citing *Emerson*
 10 *Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1102-1108; *West Pico Furniture*
 11 *Co. of Los Angeles v. Superior Court* (1961) 56 Cal.2d 407, 418; *Columbia Broadcasting*
 12 *System, Inc. v. Superior Court* (1968) 273 Cal.App.2d 12, 21; *Calcor Space Facility, Inc.*
 13 *v. Superior Court* (1997) 53 Cal.App.4th 216, 220-22.) Defendants also explained that
 14 the California Supreme Court and Courts of Appeal have limited discovery where the
 15 burden of a response outweighs the benefit and where discovery is unimportant to the
 16 resolution of important issues. (*Id.*) Plaintiff's opposition ignores these authorities.

17 B. The Sheer Volume of Plaintiff's Discovery—6,155 Requests—Is Sufficient 18 Evidence of An Intent To Harass, Annoy And Burden Defendants.

19 Defendants demonstrate in their opening brief that the time and cost associated
 20 with responding to Plaintiff's **6,155** requests alone render the requests unduly
 21 burdensome. (Motion at 9-10.) In response, Plaintiff makes little of Defendants' time
 22 estimate for responding to his 6,155 requests, claiming that one Defendant's answer
 23 "could be copied-and-pasted into the other companies' responses." (Opposition at 5:11-
 24 15.) But Plaintiff's discovery is addressed to multiple, distinct entities and responsible
 25 parties do not respond to discovery in this way.

26 Plaintiff is obfuscating when he claims that the "different counts" of discovery
 27 served upon each Defendant proves that Plaintiff attempted to tailor specific requests.
 28 (Opposition at 4:6-8.) Plaintiff propounded an identical set of 241 special interrogatories,

1 280 requests for admission and 47 requests for production on each of 10 Defendants, and
 2 an identical set of 23 form interrogatories on each of 18 Defendants. Defendants can only
 3 imagine that Plaintiff produced this discovery in minutes in the hope that Defendants
 4 would spend months crafting responses, thus gaining an unfair advantage.

5 Unless this court issues a protective order, Defendants will have to spend months
 6 serving individual responses to each and every one of Plaintiff's 6,155 requests. Plaintiff
 7 insists that a collective response among all 18 Defendants is the only means of obtaining
 8 a significant reduction in the 6,155 requests.¹ (Opposition at 3-5.) Plaintiff cites no
 9 precedent—legal or otherwise—for multiple entities making collective responses to
 10 discovery. Even so, it is impossible to understand how several different entities could
 11 collectively respond to any of the requests for admission that would bind all of them
 12 when—as Plaintiff concedes (Opposition at 3:22-25)—some Defendants will need to
 13 deny a request that others will have to admit. As consolation, Plaintiff suggests that
 14 Defendants provide “a more detailed response” to explain any collective response.
 15 (Opposition at 3:25-27.) But if the only way of managing a collective response is to *add*
 16 to the respondents' burden, the collective response will not reduce the burden of
 17 responding to 6,155 requests. It is a proposal, in other words, without a solution.

18 In the end, Plaintiff's proposal would not appreciably reduce the burden of
 19 responding to his voluminous discovery because all 18 entities would still be required to
 20 collect documents for every request for production, craft a narrative response to every
 21 interrogatory, and admit or deny every single request for admission.

22 **C. Plaintiff's Opposition Suggests That His 6,155 Requests Are Intended To**
 23 **Harass.**

24 Plaintiff offers one reason for his numerous requests: “to figure out who did

25 ¹ Plaintiff suggests that Defendants deserve this impossible burden, stating: “If
 26 they can collectively litigate, they can collectively respond to discovery.” (Opposition at
 27 5:6-8.) But Defendants have filed collective motions out of courtesy to Plaintiff, who
 28 would presumably otherwise have to respond to each individual motion. And a collective
 legal motion is not akin to a judicially-binding admission of fact.

1 what.” (Opposition at 4:9-11.) In fact, he claims that “[t]his is what discovery is for.” (*Id.*
 2 at 8:9-10.) Plaintiff is mistaken. This is what the pre-filing investigation stage is for. Even
 3 so, he could have simply asked each Defendant to admit whether it sent or advertised in
 4 any one of the 49 emails at issue. Then, with respect to each one who admits, he could
 5 lodge additional discovery. But by duplicating thousands of requests in minutes, it is
 6 clear that Plaintiff’s sole intent was to harass and to wage litigation through discovery.
 7 Each category of requests identified in Plaintiff’s opposition could have easily been
 8 narrowed or omitted.

9
 10 **1. Requests Regarding The Number Of Emails Sent Are Needlessly Harassing.**

11 Plaintiff claims—without explanation—that requests about the number of emails
 12 sent are “relevant to the issues of whether [Defendants] had effective policies and
 13 procedures to prevent [unlawful] advertising” and “direct consent.” (Opposition at 5:31-
 14 6:3.) This makes no sense. If Plaintiff really wanted to know about Defendants’ policies
 15 in this regard, he would have simply asked for them. And Plaintiff is best equipped to
 16 offer evidence about his own consent.

17
 18 **2. Requests Regarding The Amount Of Money Received By Defendants Are Needlessly Harassing.**

19 Plaintiff claims—without explanation—that requests about the amount of money
 20 received by Defendants are “relevant to the identities of DOE Defendants” and because it
 21 appears one Defendant sent emails advertising another Defendant. (Opposition at 6:6-10.)
 22 But if Plaintiff means to suggest there is anything wrong about one entity sending an
 23 email that advertises another, he is sorely misreading the state of the law. And if Plaintiff
 24 really cared to identify Doe Defendants, he would look to the emails themselves (all of
 25 which are traceable) or at least ask about who else participated in the drafting and
 26 delivery of the emails at issue. He would not insist on an overbroad intrusion into
 27 Defendants’ private financial information.
 28

1 **3. Requests Regarding the Consideration Received For Plaintiff’s Email**
2 **Address Are Needlessly Harassing.**

3 Plaintiff claims—without explanation—that requests regarding consideration are
4 “relevant to the issue of direct consent” and whether Defendants “had effective policies
5 and procedures to prevent the sending of unsolicited commercial emails.” (Opposition at
6 6:14-21.) Again, this makes no sense. If Plaintiff really wanted to know about
7 Defendants’ policies in this regard, he would have simply asked for them. And Plaintiff is
8 best equipped to offer evidence about his own consent.

9 **4. Requests Regarding Corporate Affiliation And Structure Are**
10 **Needlessly Harassing.**

11 Plaintiff claims—without explanation—that requests about corporate affiliation
12 and structure are necessary because Defendants “use[] multiple corporate identities to
13 swap assets amongst [their] various companies and attempt to avoid liability.”
14 (Opposition at 6:14-21.) There is absolutely no evidence to support this statement. More
15 importantly, Plaintiff admits that he knows the facts and that it does not matter which
16 Defendant is liable because all 18 “could allocate the judgment amongst themselves.” (*Id.*
17 at 3:27-29.) As such, Plaintiff does not need to pose such exhaustive discovery. Plaintiff
18 is talking out of both sides of his mouth. If he really wanted to identify which Defendant
19 sent each email, he would look to the emails themselves (all of which are traceable) or at
20 least ask about who participated in the drafting and delivery of the emails at issue. He
21 would not engage in a needless fishing expedition.

22 **5. Requests Regarding Branding Are Needlessly Harassing.**

23 Plaintiff suggests that requests about branding will determine whether the emails
24 are “readily traceable” to the Defendants. (Opposition at 7:1-12.) For support, Plaintiff
25 embarks on a tangential discussion about how “[s]erious marketers take their brands
26 seriously.” (*Id.* at 11:29-12:20.) But the parties already know that the emails *are* readily
27 traceable to the Defendants, all of which were named in Plaintiff’s complaint and
28 responded immediately to his allegations. Plaintiff disproves his own point in the
example he cites: an email from an address with a domain name registered to one of the

Defendants, AgreeWizard, the actual sender of the email. (Opposition at 7:12-18.) Plaintiff named AgreeWizard in the complaint, he served AgreeWizard by mail, and AgreeWizard appeared in this action. But even if one assumes the emails were not traceable to Defendants—and they are—discovery requests that explore brand positioning are not reasonably calculated to elucidate any relevant issue. The sole purpose of these requests is to harass.

6. Requests Regarding Marketing Campaigns Are Needlessly Harassing.

Plaintiff claims—without explanation—that requests about marketing campaigns are relevant to the issue of “direct consent” and whether Defendants “had effective policies and procedures” regarding commercial email. (Opposition at 7:23-27.) Again, this makes no sense. If Plaintiff really wanted to know about Defendants’ policies in this regard, he would have simply asked for them. And Plaintiff is best equipped to offer evidence about his own consent.

7. Requests Regarding All Contracts, Communications, Checks And Electronic Payments Are Needlessly Harassing.

Plaintiff claims—without explanation—that requests about all contracts, communications and payments are important to determine “whether there are grounds to piece the corporate veil.” [sic] (Opposition at 8:9-12.) This argument borders on the absurd. Plaintiff’s unsupported belief that the Defendants are sham entities does not merit an overbroad intrusion into Defendants’ private financial information.

D. Plaintiff Fails To Explain How His Requests Are Not Unreasonably Duplicative, Compound or Poorly Defined.

In their opening brief, Defendants explained that Plaintiff’s requests are unreasonably duplicative, compound and poorly defined. (Motion at 4:24-5:16.) Plaintiff’s attempt to address each point is unavailing.

1. The Terms Used in Plaintiff’s Duplicative Requests Are Synonyms.

Plaintiff admits that he lodged multiple requests that were word-for-word copies with the exception of one word, which appeared as either “approved,” “ratified,” or

1 “controlled.” (Opposition at 8:13-32.) In the context of Plaintiff’s requests, these words
 2 are indeed synonyms. But if Plaintiff insists otherwise, he undermines his own argument
 3 and proves Defendants’ point by refusing to define these terms in the requests
 4 themselves. Defendants cannot presume what Plaintiff means by these terms. Defendants
 5 asked for him to define these terms and Plaintiff refused.

6 Plaintiff also claims that some of his requests for admission are not duplicative
 7 because they employ different words and address slightly varying shades of the same
 8 issue, e.g., whether other email recipients (not Plaintiff) agreed to receive emails, whether
 9 other email recipients gave direct consent to receive emails, whether other email
 10 recipients gave direct consent to others to receive emails, etc. (Opposition at 9:1-28.)
 11 Plaintiff is missing the point. When a party lodges six requests that are more than
 12 sufficiently addressed by one request then he is needlessly duplicating his requests. When
 13 this practice is compounded across 18 sets of discovery, the intent can only be to harass.
 14 Plaintiff also ignores that none of the cited requests have anything to do with the emails
 15 at issue or even Plaintiff. At best, they might shed light on Defendants’ policies and
 16 procedures for sending commercial email. And even then, they are unnecessary because
 17 Plaintiff could just ask about those policies and procedures.

18 **2. Plaintiff’s Requests Are Needlessly Compound.**

19 In attempting to defend the compound nature of his requests, Plaintiff makes two
 20 important misstatements. First, Plaintiff claims he is entitled to explore the basis for
 21 Defendants’ belief that the emails at issue comply with the law. (Opposition at 10:2-5.)
 22 But, as Plaintiff well knows, Defendants’ subjective belief is not reasonably calculated to
 23 lead to the admissibility of any evidence in support of his causes of action, both of which
 24 are based on *objective* standards. (See Bus. & Prof. Code, §§ 17529.5 and 17538.5.)
 25 Second, he claims that Defendants are refusing to identify which party sent which email.
 26 (Opposition at 10:6.) But nothing could be further from the truth. Putting aside that the
 27 emails are traceable to the senders, Defendants would be happy to respond to 49 requests
 28 that asked with respect to each email which entity was responsible for delivery. Plaintiff

1 prefers instead to play games, lodging compound requests that needlessly add to
2 Defendants' burden.

3 **3. Plaintiff's Requests Are Poorly Defined.**

4 Many of Plaintiff's requests are poorly defined. Roughly 100 requests for
5 admission employ, but do not define the term "identify." For example, Request for
6 Admission No. 248 asks:

7 Admit that the From Name "COBRA Choice" in a COMMERCIAL
8 EMAIL ADVERTISEMENT could identify the www.
9 usahealthchoice.com/Cobra.htm website.

10 (See Declaration of Leeor Neta, dated May 23, 2013, Ex. 3, No. 248.) It is unclear
11 whether Plaintiff means to ask whether the "from" name identifies this website on its face
12 or provides sufficient clues to help a recipient identify the website through publicly
13 available database searches, which is all the law requires. But by not defining the term
14 "identify," the request is needlessly inscrutable.

15 Plaintiff's form interrogatories are particularly problematic. While his complaint
16 alleges 49 different and distinct violations of state law, Plaintiff's form interrogatories
17 attempt to shoehorn all of these incidents into the singular term definition of
18 "INCIDENT" upon which form interrogatories are based. Defendants understand that
19 form interrogatories were intended for disputes in which there is a central incident,
20 typically a single tort or negligent act. But where 49 different and distinct acts are
21 alleged, a single set of form interrogatories is of little use. Plaintiff's definition of
22 "INCIDENT" to include 49 separate incidents has flummoxed any possible response.

23 **E. Plaintiff Appears To Concede That His Overbroad Intrusion Into** 24 **Defendants' Private Financial Information Is Impermissible.**

25 In their opening brief, Defendants explain that the exhaustive financial discovery
26 being conducted by Plaintiff is relevant only to punitive damages and is precisely the type
27 of discovery abuse the courts have cautioned against. (Motion at 10:16-12:6.) In his
28 opposition, Plaintiff concedes that many of his requests are "relevant to the issue of

damages.” (Opposition at 6:4-12, 21-29.) And by “damages,” Plaintiff necessarily means punitive damages, because the only other damages he seeks are liquidated damages. Defendants should not be forced to expend the time or expense necessary to compile a mountain of information that is irrelevant to any substantive claims, and that is—at best—only remotely related to a measure of damages that may never be awarded. To do so would only heighten the “game” element of trial preparation by “substituting a battle of attrition for a search for truth” and by distorting the discovery process into a “method by which the volume or nature of information sought and not the probability of success of a claim or defense pressures settlement.” (*Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 270-271.)

F. Plaintiff’s Insistence That 6,155 Requests Are “Necessary” Is Proof Alone That There Are Complex Discovery Issues Meriting The Appointment Of A Discovery Referee.

Plaintiff cannot have it both ways. This matter is either (1) more straightforward than the unprecedented first round of 6,155 discovery requests suggests, or (2) so complex that this first round—let alone the future rounds of oral and written discovery—is a reasonable way to determine whether a mere 49 emails violate two state laws. Plaintiff’s discovery has already raised multiple issues. And if he proceeds in this fashion, this Court should only expect more such issues. These circumstances call for appointment of a discovery referee.

In his opposition, Plaintiff claims that Defendants’ motion practice is somehow responsible for the discovery nightmare he has created. (Opposition at 13:19-25.) But it strains credulity to suggest that Defendants’ removal and demurrer had anything to do with Plaintiff’s discovery. Plaintiff also claims that Defendants are trying to run up costs. (Opposition at 13:29-30.) But Defendants did not ask to be sued by Plaintiff. Defendants wanted to resolve this matter short of litigation. Plaintiff refused. Plaintiff chose to file this lawsuit, he chose to name 26 Defendants, he chose to complain about 49 emails and he must bear at least part of the burden associated with resolving the issues addressed in his complaint. Defendants can appreciate that Plaintiff would rather limit his own costs,

1 and run up Defendants' costs in order to force a swift settlement before this Court can
 2 squarely address the issues. But that alone does not support his claim that a discovery
 3 referee is not needed.

4
 5 **G. Plaintiff's First Round Of 6,155 Requests Is Proof Alone That This Case Will
 Spiral Out Of Control Without Imposition Of A Case Management Order.**

6 In their opening brief, Defendants explain that this multi-party matter regarding
 7 technical email labeling requirements gives rise to the "exceptional circumstances" that
 8 empower this Court to implement a case management order. (Motion at 13:17-14:24.) In
 9 his opposition, Plaintiff claims—without explanation—that "the issues are actually rather
 10 simple," and that any complexity is due only to Defendants' motion practice. (Opposition
 11 at 14:8-15:15.) This makes no sense. If the matter was indeed simple, there would be no
 12 need to lodge an unprecedented 6,155 requests in the very first round of discovery,
 13 regardless of whether Defendants removed and demurred. And while Plaintiff contends
 14 that trial will be short, his claim that he will put all of Defendants' discovery responses
 15 before a jury (Motion at 6:16-18) proves otherwise.

16 **III. CONCLUSION**

17 Plaintiff is acting in bad faith and is attempting to use discovery as a weapon to
 18 force an unfair advantage. Either this case is so complex that appointment of a discovery
 19 referee and imposition of a case management order are necessary, or the case is not
 20 complex and thousands of requests are not needed to address Plaintiff's claims about
 21 technical email labeling. At any rate, 6,155 discovery requests are beyond the pale and
 22 sufficient evidence of Plaintiff's intent to harass and frustrate the disposition of this
 23 matter. Defendants' motion for a protective order should be granted.

24 Date: August 14, 2013

NEWMAN DU WORS LLP

25
 26 

Leeor Neta, State Bar No. 233454

John Du Wors, State Bar No. 233913

Attorneys for Defendants Spire Vision LLC, et al.

POS-040

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="text-align: center; font-size: 1.2em;">SCV-252580</div>
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.	
<div style="text-align: center;">PROOF OF SERVICE—CIVIL</div> Check method of service (only one): <div style="display: flex; justify-content: space-between;"> <div><input type="checkbox"/> By Personal Service</div> <div><input type="checkbox"/> By Mail</div> <div><input checked="" type="checkbox"/> By Overnight Delivery</div> </div> <div style="display: flex; justify-content: space-between;"> <div><input type="checkbox"/> By Messenger Service</div> <div><input type="checkbox"/> By Fax</div> <div><input type="checkbox"/> By Electronic Service</div> </div>		JUDGE: Nancy Case Shaffer DEPT.: 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My residence or business address is:
 1201 Third Avenue, Suite 1600, Seattle, WA 98101
3. ☐ The fax number or electronic notification address from which I served the documents is *(complete if service was by fax or electronic service)*:

4. On (date): **August 14, 2013** I served the following **documents** (specify):

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE, FOR A STAY OF DISCOVERY AND IMPLEMENTATION OF A CASE MANAGEMENT ORDER

☐ The documents are listed in the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:

a. Name of person served: **Daniel L. Balsam**

b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

c. ☐ *(Complete if service was by fax or electronic service.)*

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

☒ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means (specify):

a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
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6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:
- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 14, 2013

Sarah Skaggs

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.


At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

 _____
(SIGNATURE OF DECLARANT)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
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ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This attachment is for use with form POS-040.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

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Attorneys for Defendants

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA**

Christopher Wagner, an individual,

Plaintiff,

v.

Spire Vision LLC, a Delaware limited
liability company, et al.,

Defendants

No. SCV-252580

**VERIFIED ANSWER AND
AFFIRMATIVE DEFENSES OF
DEFENDANTS ACCELERIZE NEW
MEDIA INC., ACHIEVE
OPPORTUNITIES, AGREEWIZARD,
DIGITAL PUBLISHING
CORPORATION, FURTURES DRIVE,
JUNCTIONLIGHTS, JUNIPER
MARKETING LLC, MEDIACTIVATE
LLC, ON DEMAND RESEARCH LLC,
OPPORTUNITY CENTRAL, PATHS
DIRECT, PRIME ADVERTISERS LLC,
PULLSMART, SERVE CLICKS LLC,
SPIRE VISION LLC, SPIRE VISION
HOLDINGS INC., WARD MEDIA INC.,
XL MARKETING CORP., AND
YOURADSHERE**

Defendants Accelerize New Media Inc., Achieve Opportunities, AgreeWizard,
Digital Publishing Corporation, Furturesdrive, JunctionLights, Juniper Marketing LLC,
MediActivate LLC, On Demand Research LLC, Opportunity Central, Paths Direct, Prime
Advertisers LLC, PullSmart, Serve Clicks LLC, Spire Vision LLC, Spire Vision

Holdings Inc., Ward Media Inc., XL Marketing Corp., and Youradshare (collectively, “Answering Defendants”) answer Plaintiff’s complaint as follows. Each numbered paragraph corresponds to the numbered paragraph in the complaint.

1. Answering Defendants DENY the allegations in Paragraph 1.

2. Answering Defendants DENY the allegations in Paragraph 2.

3. Answering Defendants DENY the allegations in Paragraph 3.

4. Answering Defendants DENY the allegations in Paragraph 4.

5. Answering Defendants DENY the allegations in Paragraph 5.

6. Answering Defendants have insufficient information to form a belief as to and therefore DENY the allegations in Paragraph 6.

7. Answering Defendants DENY the allegations in Paragraph 7.

8. Paragraph 8 is a request for relief and no response is required.

9. Answering Defendants DENY the allegations in Paragraph 9.

10. Answering Defendants have insufficient information to form a belief as to and therefore DENY the allegations in Paragraph 10.

11. Answering Defendants have insufficient information to form a belief as to and therefore DENY the allegations in Paragraph 11.

12. Answering Defendants have insufficient information to form a belief as to and therefore DENY the allegations in Paragraph 12.

13. Answering Defendants have insufficient information to form a belief as to and therefore DENY the allegations in Paragraph 13.

14. Answering Defendants ADMIT that Spire Vision LLC is a Delaware LLC headquartered in New York, New York, DENY that Spire Vision LLC sends or advertises in unlawful spams, and have insufficient information as to form a belief as to the meaning of and therefore DENY that Spire Vision LLC is “somehow affiliated” with other defendants.

15. Answering Defendants ADMIT that Digital Publishing Corp. is a Delaware Corporation with a primary place of business in Washington D.C., have insufficient

1 information to form a belief as to the meaning of “owns and/or operates” websites and
2 therefore DENY that allegation, and DENY the remainder of the allegations in Paragraph
3 15.

4 16. Answering Defendants admit that Juniper Marketing LLC is a Nevada LLC
5 controlled by Spire Vision LLC, have insufficient information to form a belief as to the
6 meaning of “operates” websites and therefore DENY those allegations, and DENY the
7 remainder of the allegations in Paragraph 16.

8 17. Answering Defendants ADMIT that MediActivate LLC is a Nevada LLC
9 that is a wholly-owned subsidiary of Spire Vision Holdings Inc. and DENY the
10 remainder of the allegations in Paragraph 17.

11 18. Answering Defendants admit that On Demand Research LLC is a Delaware
12 LLC with a principal place of business in New York, have insufficient information to
13 form a belief as to the meaning of “owns and/or operates” websites and therefore DENY
14 those allegations, and DENY the remainder of the allegations in Paragraph 18.

15 19. Answering Defendants ADMIT that Prime Advertisers is a Nevada LLC
16 and a subsidiary of Spire Vision Holdings, have insufficient information to form a belief
17 as to documents called “privacy policies” and therefore DENY all allegations related to
18 “privacy policies”, and DENY the remainder of the allegations in Paragraph 19.

19 20. Answering Defendants ADMIT that Serve Clicks is a Nevada LLC, have
20 insufficient information to form a belief as to the meaning of and therefore DENY that
21 Serve Clicks is “somehow affiliated” with other defendants, and DENY the remainder of
22 the allegations in Paragraph 20.

23 21. Answering Defendants ADMIT the allegations of Paragraph 21, except that
24 Answering Defendants DENY that Spire Vision Holdings Inc. sends or advertises in
25 unlawful spams.

26 22. Answering Defendants ADMIT the allegations of Paragraph 22, except
27 Defendants DENY that Ward Media is a subsidiary of Spire Vision Holdings, Inc. and
28 that Ward Media sends or advertises in unlawful spams, and have insufficient

1 information as to form a belief as to the meaning of and therefore DENY that Ward
2 Media “owns and/or operates” the websites described in Paragraph 22.

3 23. Answering Defendants ADMIT the allegations of Paragraph 23, except
4 Defendants DENY that XL Marketing Corporation sends or advertises in unlawful
5 spams.

6 24. Answering Defendants ADMIT that Achieve Opportunities is controlled by
7 Spire Vision Holdings Inc., have insufficient information to form a belief as to and
8 therefore DENY allegations relating to the existence of records with secretaries of state
9 or the address of UPS stores, and DENY the remainder of the allegations in Paragraph
10 24.

11 25. Answering Defendants ADMIT that AgreeWizard is controlled by Spire
12 Vision Holdings Inc., have insufficient information to form a belief as to and therefore
13 DENY allegations relating to the existence of records with secretaries of state, and
14 DENY the remainder of the allegations in Paragraph 25.

15 26. Answering Defendants ADMIT that Furturesdrive is controlled by Spire
16 Vision Holdings Inc., have insufficient information to form a belief as to and therefore
17 DENY allegations relating to the existence of records with secretaries of state, and
18 DENY the remainder of the allegations in Paragraph 26.

19 27. Answering Defendants ADMIT that JunctionLights is controlled by Spire
20 Vision Holdings Inc., have insufficient information to form a belief as to and therefore
21 DENY allegations relating to the existence of records with secretaries of state, and
22 DENY the remainder of the allegations in Paragraph 27.

23 28. Answering Defendants ADMIT that Opportunity Central is controlled by
24 Spire Vision Holdings Inc., have insufficient information to form a belief as to and
25 therefore DENY allegations relating to the existence of records with secretaries of state,
26 and DENY the remainder of the allegations in Paragraph 28.

27 29. Answering Defendants ADMIT that Paths Direct is controlled by Spire
28 Vision Holdings Inc., have insufficient information to form a belief as to and therefore

1 DENY the existence of records with secretaries of state, and DENY the remainder of the
2 allegations in Paragraph 29.

3 30. Answering Defendants ADMIT that PullSmart is controlled by Spire
4 Vision Holdings Inc., have insufficient information to form a belief as to and therefore
5 DENY allegations relating to the existence of records with secretaries of state, and
6 DENY the remainder of the allegations in Paragraph 30.

7 31. Answering Defendants ADMIT that Youradshare is controlled by Spire
8 Vision Holdings Inc., have insufficient information to form a belief as to and therefore
9 DENY allegations relating to the existence of records with secretaries of state, and
10 DENY the remainder of the allegations in Paragraph 26.

11 32. Answering Defendants have insufficient information to form a belief as to
12 and therefore DENY the contents of emails Plaintiff claims to have received, and DENY
13 the remainder of the allegations in Paragraph 32.

14 33. Paragraph 33 requires no response.

15 34. Defendant Accelerize New Media ADMITS the allegations related to
16 corporate status and principal place of business. Answering Defendants have insufficient
17 information to form a belief as to the term “operates” as it relates to a “platform” and
18 therefore DENY the allegations related to Cktrk.net, and DENY the remainder of the
19 allegations in Paragraph 34.

20 35. Answering Defendants have insufficient information to form a belief as to
21 the nature or activities of Adconion Media Inc. and therefore DENY that allegation.
22 Answering Defendants DENY the remainder of the allegations in Paragraph 35.

23 36. Answering Defendants DENY the allegations in Paragraph 36.

24 37. Answering Defendants have insufficient information to form a belief as to
25 and therefore DENY the allegations in Paragraph 37.

26 38. Answering Defendants have insufficient information to form a belief as to
27 and therefore DENY the allegations in Paragraph 38.

28 39. Answering Defendants have insufficient information to form a belief as to

1 and therefore DENY the allegations in Paragraph 39.

2 40. Answering Defendants have insufficient information to form a belief as to
3 and therefore DENY the allegations in Paragraph 40.

4 41. Answering Defendants have insufficient information to form a belief as to
5 and therefore DENY the allegations in Paragraph 41.

6 42. Answering Defendants have insufficient information to form a belief as to
7 and therefore DENY the allegations in Paragraph 42.

8 43. Answering Defendants DENY that Plaintiff has incurred any injuries or
9 damages as a result of the conduct alleged in the Complaint. Regarding the remainder of
10 the allegations in Paragraph 43, no response is required.

11 44. Answering Defendants DENY that a California court has jurisdiction.

12 45. Answering Defendants DENY that a California court has jurisdiction.

13 46. Answering Defendants DENY that venue is proper in Sonoma County.

14 47. Answering Defendants DENY that venue is proper in Sonoma County.

15 48. Answering Defendants DENY that venue is proper in Sonoma County.

16 49. Answering Defendants have insufficient information to form a belief as to
17 and therefore DENY the allegations in Paragraph 49.

18 50. Answering Defendants have insufficient information to form a belief as to
19 and therefore DENY the allegations in Paragraph 50.

20 51. Answering Defendants have insufficient information to form a belief as to
21 and therefore DENY the allegations in Paragraph 51.

22 52. Answering Defendants DENY the allegations in Paragraph 52.

23 53. Answering Defendants have insufficient information to form a belief as to
24 and therefore DENY the allegations in Paragraph 53.

25 54. Answering Defendants have insufficient information to form a belief as to
26 and therefore DENY the allegations in Paragraph 54.

27 55. Answering Defendants have insufficient information to form a belief as to
28 and therefore DENY the allegations in Paragraph 55.

1 56. Answering Defendants DENY the allegations in Paragraph 56.

2 57. Answering Defendants have insufficient information to form a belief as to
3 and therefore DENY the allegations in Paragraph 57.

4 58. Answering Defendants have insufficient information to form a belief as to
5 and therefore DENY the allegations in Paragraph 58.

6 59. Answering Defendants have insufficient information to form a belief as to
7 and therefore DENY the allegations in Paragraph 59.

8 60. Answering Defendants have insufficient information to form a belief as to
9 and therefore DENY the allegations in Paragraph 60.

10 61. Answering Defendants have insufficient information to form a belief as to
11 and therefore DENY the allegations in Paragraph 61.

12 62. Answering Defendants DENY the allegations in Paragraph 62.

13 63. Answering Defendants have insufficient information to form a belief as to
14 and therefore DENY the allegations in Paragraph 63.

15 64. Answering Defendants have insufficient information to form a belief as to
16 and therefore DENY the allegations in Paragraph 64.

17 65. Answering Defendants have insufficient information to form a belief as to
18 and therefore DENY the allegations in Paragraph 65.

19 66. Answering Defendants have insufficient information to form a belief as to
20 and therefore DENY the allegations in Paragraph 66.

21 67. Answering Defendants have insufficient information to form a belief as to
22 and therefore DENY the allegations in Paragraph 67.

23 68. Answering Defendants DENY the allegations in Paragraph 68.

24 69. Answering Defendants have insufficient information to form a belief as to
25 and therefore DENY the allegations in Paragraph 69.

26 70. Answering Defendants have insufficient information to form a belief as to
27 and therefore DENY the allegations in Paragraph 70.

28 71. Answering Defendants have insufficient information to form a belief as to

1 and therefore DENY the allegations in Paragraph 71.

2 72. Answering Defendants have insufficient information to form a belief as to
3 and therefore DENY the allegations in Paragraph 72.

4 73. Answering Defendants have insufficient information to form a belief as to
5 and therefore DENY the allegations in Paragraph 73.

6 74. Answering Defendants DENY the allegations in Paragraph 74.

7 75. Answering Defendants have insufficient information to form a belief as to
8 and therefore DENY the allegations in Paragraph 75.

9 76. Answering Defendants have insufficient information to form a belief as to
10 and therefore DENY the allegations in Paragraph 76.

11 77. Answering Defendants have insufficient information to form a belief as to
12 and therefore DENY the allegations in Paragraph 77.

13 78. Answering Defendants have insufficient information to form a belief as to
14 and therefore DENY the allegations in Paragraph 78.

15 79. Answering Defendants have insufficient information to form a belief as to
16 and therefore DENY the allegations in Paragraph 79.

17 80. Answering Defendants DENY the allegations in Paragraph 80.

18 81. Answering Defendants have insufficient information to form a belief as to
19 and therefore DENY the allegations in Paragraph 81.

20 82. Answering Defendants have insufficient information to form a belief as to
21 and therefore DENY the allegations in Paragraph 82.

22 83. Answering Defendants have insufficient information to form a belief as to
23 and therefore DENY the allegations in Paragraph 83.

24 84. Answering Defendants have insufficient information to form a belief as to
25 and therefore DENY the allegations in Paragraph 84.

26 85. Answering Defendants have insufficient information to form a belief as to
27 and therefore DENY the allegations in Paragraph 85.

28 86. Answering Defendants have insufficient information to form a belief as to

1 and therefore DENY the allegations in Paragraph 86.

2 87. Answering Defendants DENY the allegations in Paragraph 87.

3 88. Paragraph 88 characterizes emails. Answering Defendants dispute
4 Plaintiff's characterization. No response is required because the emails speak for
5 themselves.

6 89. Paragraph 89 characterizes emails. Answering Defendants dispute
7 Plaintiff's characterization. No response is required because the emails speak for
8 themselves.

9 90. Answering Defendants have insufficient information to form a belief as to
10 and therefore DENY the allegations in Paragraph 90.

11 91. Answering Defendants have insufficient information to form a belief as to
12 and therefore DENY the allegations in Paragraph 91.

13 92. Answering Defendants have insufficient information to form a belief as to
14 and therefore DENY the allegations in Paragraph 92.

15 93. Answering Defendants have insufficient information to form a belief as to
16 and therefore DENY the allegations in Paragraph 93.

17 94. Answering Defendants have insufficient information to form a belief as to
18 and therefore DENY the allegations in Paragraph 94.

19 95. Answering Defendants have insufficient information to form a belief as to
20 and therefore DENY the allegations in Paragraph 95.

21 96. Answering Defendants DENY the allegations in Paragraph 96.

22 97. Answering Defendants have insufficient information to form a belief as to
23 and therefore DENY the allegations in Paragraph 97.

24 98. Answering Defendants have insufficient information to form a belief as to
25 and therefore DENY the allegations in Paragraph 98.

26 99. Answering Defendants have insufficient information to form a belief as to
27 and therefore DENY the allegations in Paragraph 99.

28 100. Answering Defendants have insufficient information to form a belief as to

1 and therefore DENY the allegations in Paragraph 100.

2 101. Answering Defendants have insufficient information to form a belief as to
3 and therefore DENY the allegations in Paragraph 101.

4 102. Answering Defendants have insufficient information to form a belief as to
5 and therefore DENY the allegations in Paragraph 102.

6 103. Answering Defendants have insufficient information to form a belief as to
7 and therefore DENY the allegations in Paragraph 103.

8 104. Answering Defendants have insufficient information to form a belief as to
9 and therefore DENY the allegations in Paragraph 104.

10 105. Answering Defendants have insufficient information to form a belief as to
11 and therefore DENY the allegations in Paragraph 105.

12 106. Answering Defendants DENY the allegations in Paragraph 106.

13 107. Answering Defendants have insufficient information to form a belief as to
14 and therefore DENY the allegations in Paragraph 107.

15 108. Answering Defendants have insufficient information to form a belief as to
16 and therefore DENY the allegations in Paragraph 108.

17 109. Answering Defendants have insufficient information to form a belief as to
18 and therefore DENY the allegations in Paragraph 109.

19 110. Answering Defendants have insufficient information to form a belief as to
20 and therefore DENY the allegations in Paragraph 110.

21 111. Answering Defendants have insufficient information to form a belief as to
22 and therefore DENY the allegations in Paragraph 111.

23 112. Answering Defendants have insufficient information to form a belief as to
24 and therefore DENY the allegations in Paragraph 112.

25 113. Answering Defendants DENY the allegations in Paragraph 113.

26 114. Answering Defendants have insufficient information to form a belief as to
27 and therefore DENY the allegations in Paragraph 114.

28 115. Answering Defendants DENY the allegations in Paragraph 115.

1 116. Answering Defendants have insufficient information to form a belief as to
2 and therefore DENY the allegations in Paragraph 116.

3 117. Answering Defendants have insufficient information to form a belief as to
4 and therefore DENY the allegations in Paragraph 117.

5 118. Answering Defendants have insufficient information to form a belief as to
6 and therefore DENY the allegations in Paragraph 118.

7 119. Answering Defendants have insufficient information to form a belief as to
8 and therefore DENY the allegations in Paragraph 119.

9 120. Answering Defendants have insufficient information to form a belief as to
10 and therefore DENY the allegations in Paragraph 120.

11 121. Answering Defendants have insufficient information to form a belief as to
12 and therefore DENY the allegations in Paragraph 121.

13 122. Answering Defendants DENY the allegations in Paragraph 122.

14 123. Answering Defendants have insufficient information to form a belief as to
15 and therefore DENY the allegations in Paragraph 123.

16 124. Answering Defendants have insufficient information to form a belief as to
17 and therefore DENY the allegations in Paragraph 124.

18 125. Answering Defendants DENY the allegations in Paragraph 125.

19 126. Paragraph 126 is a reincorporation and no response is required.

20 127. Answering Defendants DENY the allegations in Paragraph 127.

21 128. Answering Defendants have insufficient information to form a belief as to
22 and therefore DENY the allegations in Paragraph 128.

23 129. Paragraph 129 paraphrases a statute and no response is required.

24 130. Answering Defendants DENY the allegations in Paragraph 130.

25 131. Paragraph 131 characterizes a court decision. Answering Defendants
26 dispute Plaintiff's characterization. No response is required because the decision speaks
27 for itself.

28 132. Answering Defendants DENY the allegations in Paragraph 132.

1 133. Paragraph 133 characterizes a statute. Answering Defendants dispute
2 Plaintiff's characterization. No response is required because the statute speaks for itself.

3 134. Answering Defendants DENY the allegations in Paragraph 134.

4 135. Answering Defendants DENY the allegations in Paragraph 135.

5 136. Answering Defendants DENY the allegations in Paragraph 136.

6 137. Answering Defendants have insufficient information to form a belief as to
7 and therefore DENY the allegations in Paragraph 137.

8 138. Answering Defendants DENY the allegations in Paragraph 138.

9 139. Answering Defendants have insufficient information to form a belief as to
10 and therefore DENY the allegations in Paragraph 139.

11 140. Answering Defendants have insufficient information to form a belief as to
12 and therefore DENY the allegations in Paragraph 140.

13 141. Answering Defendants have insufficient information to form a belief as to
14 and therefore DENY the allegations in Paragraph 141.

15 142. Answering Defendants have insufficient information to form a belief as to
16 and therefore DENY the allegations in Paragraph 142.

17 143. Answering Defendants have insufficient information to form a belief as to
18 and therefore DENY the allegations in Paragraph 143.

19 144. Paragraph 144 characterizes a statute. Answering Defendants dispute
20 Plaintiff's characterization. No response is required because the statute speaks for itself.

21 145. Answering Defendants DENY the allegations in Paragraph 145.

22 146. Answering Defendants DENY the allegations in Paragraph 146.

23 147. Paragraph 147 characterizes a statute. Answering Defendants dispute
24 Plaintiff's characterization. No response is required because the statute speaks for itself.

25 148. Answering Defendants DENY the allegations in Paragraph 148.

26 149. Answering Defendants DENY the allegations in Paragraph 149.

27 150. Paragraph 150 characterizes an email. Answering Defendants dispute
28 Plaintiff's characterization. No response is required because the email speaks for itself.

151. Answering Defendants DENY the allegations in Paragraph 151.

152. Paragraph 152 characterizes a statute. Answering Defendants dispute Plaintiff's characterization. No response is required because the statute speaks for itself.

153. Paragraph 153 characterizes a statute. Answering Defendants dispute Plaintiff's characterization. No response is required because the statute speaks for itself.

154. Answering Defendants DENY the allegations in Paragraph 154.

155. Answering Defendants DENY the allegations in Paragraph 155.

156. Answering Defendants DENY the allegations in Paragraph 156.

157. To the extent Paragraph 157 characterizes a statute, Answering Defendants dispute Plaintiff's characterization. No response is required because the statute speaks for itself. Answering Defendants DENY the remainder of the allegations in Paragraph 157

158. Paragraph 158 is argument and no response is required. To the extent a response is required, Answering Defendants DENY the allegations in Paragraph 158.

159. Answering Defendants DENY the allegations in Paragraph 159.

160. Answering Defendants DENY the allegations in Paragraph 160.

161. Paragraph 161 is a statement that Wagner is seeking attorney's fees, and no response is required.

162. Answering Defendants DENY the allegations in Paragraph 162.

163. Paragraph 163 is a reincorporation, and no response is required.

164. Paragraph 164 quotes a statute, and no response is required.

165. Answering Defendants DENY the allegations in Paragraph 165.

166. Answering Defendants DENY the allegations in Paragraph 166.

167. Answering Defendants DENY the allegations in Paragraph 167.

168. Answering Defendants DENY the allegations in Paragraph 168.

169. Answering Defendants DENY the allegations in Paragraph 169.

The remainder of the complaint is a prayer for relief, and no response is required.

I. AFFIRMATIVE DEFENSES

Without admitting any allegations in the Complaint, Answering Defendants assert

1 the following affirmative defenses:

2 1. Plaintiff's claims are preempted by the Federal CAN-SPAM Act of 2003
3 (15 U.S.C. § 7701). The Federal CAN-SPAM Act preempts Plaintiff's state law claims
4 because they do not sound in tort. (*Gordon v. Virtumundo, Inc.* (9th Cir. 2009) 575 F.3d
5 1040.)

6 2. The Complaint fails to state a claim upon which relief may be granted.
7 Plaintiff's first cause of action fails because each "from" line in each of the 49 emails at
8 issue can be traced to the sender of the email. (*See, e.g., Kleffman v. Vonage Holdings*
9 *Corp.* (2010) 49 Cal. 4th 334, 345.) Plaintiff's first cause of action fails because each
10 "subject" line in each of the 49 emails at issue reasonably describes the contents of the
11 email. (*See, e.g., Asis Internet Servs. v. Member Source Media, LLC*, 2010 U.S. Dist.
12 LEXIS 47865.) Plaintiff's second cause of action fails because he is a private citizen and
13 private citizens cannot sue for damages for alleged violation of Business and Professions
14 Code, Section 17538.5.

15 3. Plaintiff failed to mitigate his alleged damages, if any. Plaintiff has not
16 incurred any economic damages. Even if he had, he failed to mitigate by requesting that
17 Answering Defendants remove his name from their email subscription lists. Plaintiff
18 could have easily unsubscribed from these email lists by either clicking the opt-out link in
19 any of the emails or by contacting Answering Defendants at their places of business.

20 4. Plaintiff waived his claims. On information and belief, Plaintiff either opted
21 in or took certain actions to induce Answering Defendants and/or their affiliates to place
22 his email address on their email subscription lists.

23 5. Plaintiff's claims are barred by the doctrine of estoppel. On information and
24 belief, Plaintiff either opted in or took certain actions to induce Answering Defendants
25 and/or their affiliates to place his email address on their email subscription lists.

26 6. The damages alleged in the Complaint, if any, were not caused by
27 Answering Defendants, but were caused by one or more third parties whose activities
28 were not approved, ratified, or controlled by Answering Defendants.

1 7. Plaintiff has failed to join one or more necessary and indispensable parties.

2 8. Venue and jurisdiction are improper. Plaintiff cannot state a cause of action
3 against the two Answering Defendants, namely Accelerize New Media and LifeScript,
4 that are principally based in California and were added solely for the purpose of defeating
5 federal court jurisdiction. More than \$75,000 is in controversy as a result of the expected
6 claim for attorney's fees. Grounds exist for removal to federal court.

7 9. Answering Defendants reserve the right to add more defenses as discovery
8 proceeds.

9 **PRAYER FOR RELIEF**

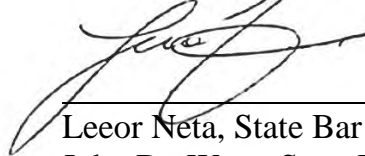
10 Accordingly, Answering Defendants pray for the following relief:

11 A. Dismissal of the Complaint with prejudice.

12 B. Attorney's fees and costs, as allowed by law.

13
14 Respectfully submitted this 16th day of August, 2013.

15
16 **NEWMAN DU WORS LLP**

17 

18 Leeor Neta, State Bar No. 233454

19 John Du Wors, State Bar No. 233913

20 Attorneys for Defendants Accelerize New

21 Media Inc., Achieve Opportunities,

22 AgreeWizard, Digital Publishing Corporation,

23 Furturesdrive, JunctionLights, Juniper

24 Marketing LLC, MediActivate LLC, On

25 Demand Research LLC, Opportunity Central,

26 Paths Direct, Prime Advertisers LLC,

27 PullSmart, Serve Clicks LLC, Spire Vision

28 LLC, Spire Vision Holdings Inc., Ward Media

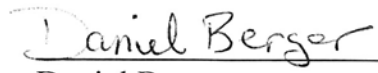
Inc., XL Marketing Corp., and Youradshare

VERIFICATION

I am Daniel Berger of Spire Vision LLC, a party to this action, and am authorized to make this verification on its behalf. I have read the foregoing Answer and know its contents. I am informed and believe and on that ground allege that the matters stated in the Answer are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 16, 2013 in Washington, DC.


Daniel Berger

POS-040

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="text-align: center; font-size: 1.2em;">SCV-252580</div>
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.	
<div style="text-align: center;">PROOF OF SERVICE—CIVIL</div> Check method of service (only one): <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Messenger Service </div> <div> <input type="checkbox"/> By Mail <input type="checkbox"/> By Fax </div> <div> <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Electronic Service </div> </div>	
JUDGE: Nancy Case Shaffer DEPT.: 18	

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My residence or business address is:
 1201 Third Avenue, Suite 1600, Seattle, WA 98101
3. ☐ The fax number or electronic notification address from which I served the documents is *(complete if service was by fax or electronic service)*:
4. On (date): **August 16, 2013** I served the following **documents (specify)**:

☒ The documents are listed in the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:

- a. Name of person served: **Daniel L. Balsam**
- b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- c. ☐ *(Complete if service was by fax or electronic service.)*

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means *(specify)*:

- a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
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6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:

- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:


- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 16, 2013

Sarah Skaggs

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

 _____
(SIGNATURE OF DECLARANT)

POS-040(D)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
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ATTACHMENT TO PROOF OF SERVICE—CIVIL (DOCUMENTS SERVED)*(This Attachment is for use with form POS-040)***The documents that were served are as follows *(describe each document specifically)*:**

VERIFIED ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS ACCELERIZE NEW MEDIA INC., ACHIEVE OPPORTUNITIES, AGREEWIZARD, DIGITAL PUBLISHING CORPORATION, FURTURES DRIVE, JUNCTIONLIGHTS, JUNIPER MARKETING LLC,

MEDIACTIVATE LLC, ON DEMAND RESEARCH LLC, OPPORTUNITY CENTRAL, PATHS DIRECT, PRIME ADVERTISERS LLC, PULLSMART, SERVE CLICKS LLC, SPIRE VISION LLC, SPIRE VISION HOLDINGS INC., WARD MEDIA INC., XL MARKETING CORP.,

AND YOURADSHERE

Box 145

ENDORSED
FILED

AUG 19 2013

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA

1 John Du Wors, State Bar No. 233913
john@newmanlaw.com
2 Leeor Neta, State Bar No. 233454
leeor@newmanlaw.com
3 NEWMAN DU WORS LLP
4 1201 Third Avenue, Suite 1600
Seattle, WA 98101
5 Telephone: (206) 274-2800
6 Facsimile: (206) 274-2801

7 Attorneys for Defendants
8
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SONOMA**

12 Christopher Wagner, an individual,

13 Plaintiff,

14 v.

15 Spire Vision LLC, a Delaware limited liability
company, et al.,

16 Defendants.
17
18
19
20
21
22

Civil Case No. SCV-252580

**DECLARATION OF LEEOR NETA
REGARDING MEET AND
CONFERENCE ON
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER OR, IN
THE ALTERNATIVE, FOR A
STAY OF DISCOVERY AND
IMPLEMENTATION OF A CASE
MANAGEMENT ORDER
(SONOMA COUNTY LOCAL
RULE 5.4)**

Hearing Date: August 21, 2013

Hearing Time: 3:30 pm

Dept. No. 18

Judge: Hon. Nancy Case Shaffer

23 I, Leeor Neta, declare as follows:

24 1. I am an attorney with Newman Du Wors LLP, counsel for Defendants
25 Spire Vision LLC, et al. I have personal knowledge of the facts set forth in this
26 declaration and could and would competently testify to them under oath if called as a
27 witness.

28 2. On Thursday, August 15, counsel for Plaintiff Christopher Wagner, Dan

COPY

By Fax

1 Balsam, and I spoke by telephone for nearly one hour in a reasonable and good faith
2 attempt to informally resolve Defendants' motion for protective order with respect to
3 Plaintiff's 6,155 written discovery requests.

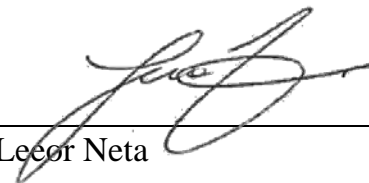
4 3. The parties agreed that there was no need to stay discovery pending
5 resolution of Defendants' demurrer, which the Court denied on August 7.

6 4. But Defendants continue to believe that Plaintiff copied and pasted 6,155
7 discovery requests and are demanding that 18 distinct Defendants bear the impossible
8 burden of responding to every single one.

9 5. During the telephone call, counsel for Plaintiff cited no authority for such
10 voluminous discovery. He insisted that there were only two ways to narrow Defendants'
11 burden: a collective response or an agreement to certain stipulations that would equate to
12 admissions of liability and answers to discovery at any rate. Despite Plaintiff's insistence
13 that 6,155 discovery requests were necessary and appropriate, counsel for Plaintiff
14 refused to agree to appointment of a discovery referee or imposition of a case
15 management order.

16
17 I declare under penalty of perjury that the foregoing is true and correct.

18
19 Executed in San Francisco, California on August 19, 2013.

20
21
22 
23 Leeor Neta

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="text-align: center; font-size: 1.2em;">SCV-252580</div>	
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.		
<div style="text-align: center;">PROOF OF SERVICE—CIVIL</div> Check method of service (only one): <div style="display: flex; justify-content: space-between;"> <div><input type="checkbox"/> By Personal Service</div> <div><input type="checkbox"/> By Mail</div> <div><input checked="" type="checkbox"/> By Overnight Delivery</div> </div> <div style="display: flex; justify-content: space-between;"> <div><input type="checkbox"/> By Messenger Service</div> <div><input type="checkbox"/> By Fax</div> <div><input type="checkbox"/> By Electronic Service</div> </div>		JUDGE: Nancy Case Shaffer DEPT.: 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My residence or business address is:
 1201 Third Avenue, Suite 1600, Seattle, WA 98101
3. ☐ The fax number or electronic notification address from which I served the documents is *(complete if service was by fax or electronic service)*:
4. On (date): **August 19, 2013** I served the following **documents** (specify):

DECLARATION OF LEEOR NETA REGARDING MEET AND CONFER CONFERENCE ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER

☐ The documents are listed in the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:

- a. Name of person served: **Daniel L. Balsam**
- b. ☒ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- c. ☐ *(Complete if service was by fax or electronic service.)*

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means (specify):

- a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
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6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (*specify one*):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):
- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.*)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 19, 2013

Lindsey Rowson

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.


At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

 _____
(SIGNATURE OF DECLARANT)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
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ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)

(This attachment is for use with form POS-040.)

NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____


1 John Du Wors, State Bar No. 233913
 2 john@newmanlaw.com
 3 Leeor Neta, State Bar No. 233454
 4 leeor@newmanlaw.com
 5 NEWMAN DU WORS LLP
 6 1201 Third Avenue, Suite 1600
 7 Seattle, WA 98101
 8 Telephone: (206) 274-2800
 9 Facsimile: (206) 274-2801

10 Attorneys for Defendants

11
 12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 13 **COUNTY OF SONOMA**

FILED

AUG 27 2013

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF SONOMA
 BY  DEPUTY CLERK

By Fax

14 Christopher Wagner, an individual,

15 Plaintiff,

16 v.

17 Spire Vision LLC, a Delaware limited liability
 18 company, et al.,

19 Defendants.

Civil Case No. SCV-252580

**DECLARATION OF LEEOR NETA
 IN SUPPORT OF DEFENDANTS'
 MOTION FOR PROTECTIVE
 ORDER OR, IN THE
 ALTERNATIVE, FOR A STAY OF
 DISCOVERY AND
 IMPLEMENTATION OF A CASE
 MANAGEMENT ORDER**

Hearing Date: September 11, 2013
 Hearing Time: 3:30 pm
 Dept. No. 18
 Judge: Hon. Nancy Case Shaffer

1 I, Leeor Neta, declare as follows:

2 1. I am an attorney with Newman Du Wors LLP, counsel for Defendant Spire
3 Vision LLC, et al. I have personal knowledge of the facts set forth in this declaration and
4 could and would competently testify to them under oath if called as a witness.

5 2. Shortly after this matter was removed to and then returned from federal
6 court, counsel for Plaintiff—Daniel Balsam—contacted me regarding discovery. He
7 warned that “discovery will be . . . extensive” unless Defendants permitted Plaintiff to
8 treat them as a single conglomerate, when in fact they are separate—though affiliated—
9 corporations, LLCs, and DBAs. My clients felt compelled to refuse, concerned with how
10 they would provide a collective response to requests regarding multiple emails for which
11 everyone was not even allegedly responsible.

12 3. Plaintiff then served Defendants with 6,155 discovery requests. All 18 of
13 my clients received a separate set of 23 Form Interrogatories. Upon each of 10 of my
14 clients, Plaintiff also served a separate set of over 240 Special Interrogatories, a separate
15 set of 47 or more Requests for Production, and a separate sets of 280 or more Requests
16 for Admission. Upon review, it became clear that most of the requests had little direct
17 connection to the elements of Plaintiff’s causes of action, i.e., whether the emails at issue
18 contain unauthorized third-party domain names; falsified, misrepresented, or forged
19 header information; or objectively and materially misleading subject lines. Most of the
20 requests failed to address the matter of direct consent to receive the emails, as well as
21 Defendants’ efforts to effectively prevent unsolicited commercial e-mail advertisements.

22 4. Included with this declaration is a CD-ROM containing Plaintiff’s
23 voluminous discovery, including 10 sets of Special Interrogatories (**Exhibit 1**).

24 5. This CD-ROM also contains Plaintiff’s 10 sets of Requests for Production
25 (**Exhibit 2**).

26 6. This CD-ROM also contains Plaintiff’s 10 sets of Requests for Admission
27 (**Exhibit 3**).

28 7. This CD-ROM also contains Plaintiff’s 18 sets of Form Interrogatories

1 (Exhibit 4).

2 8. After spending several hours reviewing Plaintiff's voluminous discovery, I
3 contacted Plaintiff's attorneys—Daniel Balsam and Timothy Walton—in an effort to
4 meet and confer in good faith. On Friday, May 2, we spoke by phone for nearly two and a
5 half hours. During that time, we were able to discuss only a small fraction of the
6 discovery. Still, Mr. Balsam and Mr. Walton made clear their position that Defendants
7 were at fault for the number of requests, because Defendants refused to allow themselves
8 to be treated as a single conglomerate and provide a collective response.

9 9. I explained why a collective response was impossible, noting that no effort
10 was made to tailor each request to each Defendant and that instead Plaintiff copied and
11 pasted piles of requests to all Defendants. I also explained that there were whole
12 categories of requests—within individual sets of discovery—for which the burden of
13 response outweighed any possible utility, thus undermining Plaintiff's position that a
14 collective response would solve the problem. Finally, I explained that most of the
15 requests seemed intentionally overbroad and duplicative. Mr. Walton responded:
16 "Answer with what you can and if we think it's sufficient, we won't move to compel."
17 Asked for the rationale behind numerous requests, Mr. Walton made clear his intention to
18 attempt to embarrass Defendants, stating he could not wait to "put this in front of a jury."

19 10. On Monday, May 6, Mr. Balsam contacted me via email. Attached as
20 Exhibit 5 is a true and correct copy of the email I received from Mr. Balsam on May 6,
21 2013. He again suggested that the discovery could be reduced by "NINETY PERCENT"
22 if Defendants provided a collective response. (*Id.* [emphasis in original].) Mr. Balsam
23 also suggested that a collective response would eliminate the need for a response to
24 170—or less than 3%—of the whole volume, and perhaps more, but provided no details.
25 (*Id.*) Finally, Mr. Balsam suggested that a stipulation regarding liability could "remove
26 entire categories of questions." (*Id.*) But Mr. Balsam did not address the great bulk of
27 Plaintiff's requests or the specific concerns raised during the telephonic meet and confer.
28 (*Id.*)

1 11. While working with Defendants to provide substantive responses to
2 Plaintiff's voluminous discovery, I contacted Mr. Balsam and Mr. Walton via email on
3 Wednesday, May 22, to suggest a stipulated mutual stay of discovery pending a hearing
4 on the Demurrer to Plaintiff's complaint, dated May 2, 2013. Attached as **Exhibit 6** is a
5 true and correct copy of the email I received from Mr. Balsam on May 22, 2013.
6 Mr. Balsam flatly refused, insisting yet again that Plaintiff's discovery could be reduced
7 by "NINETY PERCENT" if Defendants provided a collective response. (*Id.* [emphasis in
8 original].) Mr. Balsam closed by noting, "We know the facts, and are not trying to hide
9 anything." (*Id.*)

10
11 I declare under penalty of perjury that the foregoing is true and correct.

12
13 Executed in San Francisco, California on May 23, 2013.

14
15
16 
17 _____
18 Leeor Neta

NEWMAN | DUWORS
ATTORNEYS

Wagner v. Spire Vision LLC et al
Case No. SCV-252580

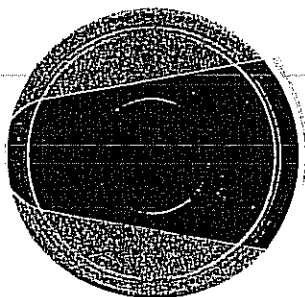


Exhibit 1
To Declaration of Leeor Neta
Motion for Protective Order

NEWMAN | DUWORS
ATTORNEYS

Wagner v. Spire Vision LLC et al
Case No. SCV-252580

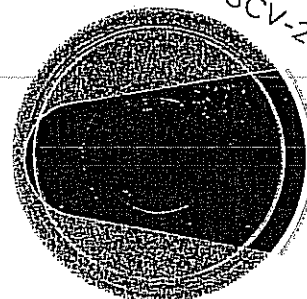


Exhibit 2
To Declaration of Leeor Neta
Motion for Protective Order

NEWMAN | DUWORS
ATTORNEYS

Wagner v. Spire Vision LLC et al
Case No. SCV-252580

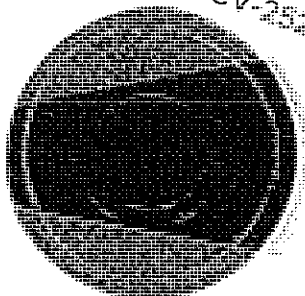


Exhibit 3
To Declaration of Leeor Neta
Motion for Protective Order

NEWMAN | DUWORS
ATTORNEYS

Wagner v. Spire Vision LLC et al
Case No. SCV-252580

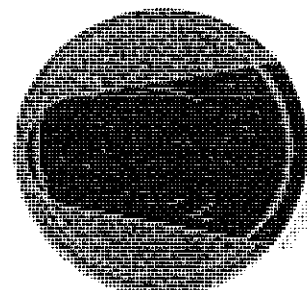


Exhibit 4
To Declaration of Leeor Neta
Motion for Protective Order

Exhibit 5

From: Dan Balsam [legal@danbalsam.com]
Sent: Monday, May 06, 2013 5:10 PM
To: Leeor Neta; John Du Wors
Cc: twalton@twalton.net; Keith Scully
Subject: Wagner's discovery to Spire Vision

Mr. Neta,

On our call last Friday, you complained that Wagner's discovery to Spire Vision is excessive, duplicative, burdensome, etc.

However, this is a problem entirely of Spire Vision's own making.

First, Spire Vision chose to create at least 10 companies, at least 10 brands, and dozens of domain names. That necessitated extensive discovery, and we strongly believe that every question propounded is appropriate.

Second, you rejected our repeated requests to treat the Spire Vision entities collectively for discovery purposes, even though they have treated themselves collectively in pleadings and motions.

Nevertheless, we again offer your clients the opportunity to provide one set of responses to RFAs, SROGs, and RFPDs on behalf of all Spire Vision entities. That would immediately reduce your required responses by NINETY PERCENT. It would ALSO reduce the discovery WITHIN the one remaining set, because it would make unnecessary questions such as, for example, connections between the companies and which company owns certain properties (SROGs #29-31, 163-168, 223-240, and perhaps more).

We could also consider certain stipulations that would remove entire categories of questions. On the call, I posed a hypothetical that if you'll stipulate that Wagner did NOT give direct consent to any Spire Vision company or any of its advertising clients, that would eliminate a lot of questions about direct consent. Other hypothetical possibilities include:

- * A stipulation that Spire Vision (collectively) owns and operates a certain list of domain names would eliminate a lot of SROGs.
- * A stipulation that none of the "brands" (Achieve Opportunities, etc.) are readily traceable to any Spire Vision entity would remove a number of questions.
- * A stipulation that Spire Vision does not target its advertising would remove a number of questions about targeting, criteria, etc.

We could probably come up with more examples too. Note, we are NOT committing to any of these at this moment without our client's approval. They're merely hypotheticals; food for discussion.

Finally, we might be open to extending your time to respond, so long as we agree that the responses will be substantive, and not merely objections.

Please let us know your thoughts.

=====
Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

Exhibit 6

From: Dan Balsam [legal@danbalsam.com]
Sent: Wednesday, May 22, 2013 11:26 AM
To: Timothy Walton; twalton@twalton.net; Leeor Neta
Cc: John Du Wors
Subject: Re: Wagner: Meet and confer effort

Leeor,

Spire's demurrer to Wagner's complaint in state court after remand is entirely improper, because Spire filed an answer while the matter was in federal court. Rather than asking for additional time for discovery, you should be taking your demurrer off calendar and filing a verified answer(s).

As for Wagner's discovery, it may be voluminous, but it's also necessary, as you also seem to believe since you are requesting the opportunity to send voluminous discovery of your own. Moreover, we repeatedly offered you the opportunity to reduce Wagner's discovery by NINETY PERCENT, both before AND after we served it. All you had to do was agree to let us treat the various Spire entities collectively for discovery purposes, which was an entirely reasonable request, considering that they treated themselves collectively in various filings and when they propounded discovery. Actually, you could have reduced the discovery by even MORE than 90%, because we could have eliminated various questions within the one remaining set. And, we offered you the opportunity to stipulate to certain topics which would have further eliminated entire categories of discovery questions. You have the right to refuse that offer, but the net result is that your clients are creating the need for voluminous discovery by: 1) using multiple entities to send spam; 2) refusing to acknowledge any problems at all with spam that unquestionably violates the statute under common interpretations of case law; and 3) refusing to cooperate in any way with other entirely reasonable requests, such as by handling discovery in electronic form rather than paper.

So, your stated reason for needing additional time is unpersuasive. Further, your offer to extend our time is illusory because we don't need additional time. We know the facts and we are not trying to hide anything. Perhaps you could find another way to tempt us to make a deal, rather than expecting us to make concessions even as you refuse our requests.

Dan

Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

--- On Wed, 5/22/13, Leeor Neta <Leeor@newmanlaw.com> wrote:

From: Leeor Neta <Leeor@newmanlaw.com>
Subject: Wagner: Meet and confer effort
To: "Dan Balsam" <legal@danbalsam.com>, "Timothy Walton" <timothy.walton.47@gmail.com>, "twalton@twalton.net" <twalton@twalton.net>
Cc: "John Du Wors" <John@newmanlaw.com>
Date: Wednesday, May 22, 2013, 8:53 AM

Hi Tim / Dan,

I unfortunately have to postpone the meet and confer regarding your demurrer, which we had scheduled for today. My son has some event at school that he sprung on me this morning and I really would like to attend. Can we talk Friday or late tomorrow afternoon?

Also, I wanted to obtain your consent to a stay of your discovery in Wagner. Though we have now had two telephonic discussions regarding your voluminous requests, we have not managed to reasonably narrow the scope. And yet, there is a demurrer to the complaint pending. What is your opinion as to a stipulated stay of discovery until the Court rules on the demurrer to the complaint? We will of course agree that the stay should be mutually imposed.

Would you mind getting back to me by the end of the day?

Thank you,
Leeor

P.S. Tim, I noticed on your website that you handle special education matters pro bono. I'd like to talk to you some time about potential pro bono clients in East Palo Alto, where I used to run a nonprofit youth program.

Sent from my iPhone

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY <div style="font-size: 2em; font-weight: bold; letter-spacing: 0.5em;">FILED</div> AUG 27 2013 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA BY <u> </u> DEPUTY CLERK
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="font-size: 1.2em; font-weight: bold;">SCV-252580</div> JUDGE: Nancy Case Shaffer DEPT.: 18
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.	
<div style="text-align: center; font-weight: bold;">PROOF OF SERVICE—CIVIL</div> Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service	

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.
2. My residence or business address is:
1201 Third Avenue, Suite 1600, Seattle, WA 98101
3. ☐ The fax number or electronic notification address from which I served the documents is (complete if service was by fax or electronic service):

4. On (date): **August 26, 2013** I served the following documents (specify):

DECLARATION OF LEEOR NETA IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE, FOR A STAY OF DISCOVERY AND IMPLEMENTATION OF A CASE MANAGEMENT ORDER

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

5. I served the documents on the person or persons below, as follows:

- a. Name of person served: **Daniel L. Balsam**
- b. ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- c. ☐ (Complete if service was by fax or electronic service.)

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

6. The documents were served by the following means (specify):

- a. ☐ By personal service. I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
---	----------------------------

6. b. ☐ By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (specify one):

- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

c. ☒ By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d. ☐ By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

e. ☐ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.


f. ☐ By electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 26, 2013

Sarah Skaggs

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

☐ By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

SHORT TITLE:

Wagner v. Spirevision LLC et al

CASE NUMBER:

SCV-252580

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This attachment is for use with form POS-040.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:****Name of Person Served***(If the person served is an attorney, the party or parties represented should also be stated.)***Where Served***(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)***Time of Service***(Complete for service by fax transmission or electronic service.)*

Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.	FOR COURT USE ONLY <div style="font-size: 2em; font-weight: bold; letter-spacing: 5px;">FILED</div> AUG 27 2013 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA BY <u> </u> DEPUTY CLERK					
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse	CASE NUMBER: <div style="font-size: 1.2em; font-weight: bold;">SCV-252580</div> JUDGE: Nancy Case Shaffer DEPT.: 18					
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.						
<div style="text-align: center; font-weight: bold;">PROOF OF SERVICE—CIVIL</div> Check method of service (only one): <table style="width: 100%;"> <tr> <td><input type="checkbox"/> By Personal Service</td> <td><input type="checkbox"/> By Mail</td> <td><input checked="" type="checkbox"/> By Overnight Delivery</td> </tr> <tr> <td><input type="checkbox"/> By Messenger Service</td> <td><input type="checkbox"/> By Fax</td> <td><input type="checkbox"/> By Electronic Service</td> </tr> </table>		<input type="checkbox"/> By Personal Service	<input type="checkbox"/> By Mail	<input checked="" type="checkbox"/> By Overnight Delivery	<input type="checkbox"/> By Messenger Service	<input type="checkbox"/> By Fax
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1201 Third Avenue, Suite 1600, Seattle, WA 98101
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Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- c. ☐ (Complete if service was by fax or electronic service.)

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

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(Continued on back)

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
---	----------------------------

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- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

c. ☒ By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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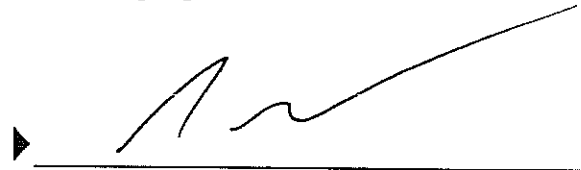
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 26, 2013

Sarah Skaggs

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

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At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

SHORT TITLE:

Wagner v. Spirevision LLC et al

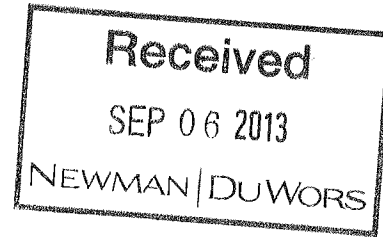
CASE NUMBER:

SCV-252580

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This attachment is for use with form POS-040.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:****Name of Person Served***(If the person served is an attorney, the party or parties represented should also be stated.)***Where Served***(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)***Time of Service***(Complete for service by fax transmission or electronic service.)*

Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

1 Timothy J. Walton (State Bar No. 184292)
2 Jim C. Twu (State Bar No. 175032)
3 WALTON TWU LLP
4 9515 Soquel Drive, Suite 207
5 Aptos, CA 95003-4137
6 Phone (831) 685-9800
7 Fax: (650) 618-8687



8 Daniel L. Balsam (State Bar No. 260423)
9 THE LAW OFFICES OF DANIEL BALSAM
10 2912 Diamond Street #218
11 San Francisco, CA 94131
12 Phone: (415) 869-2873
13 Fax: (415) 869-2873

14 Attorneys for Plaintiff Christopher Wagner

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

17 CHRISTOPHER WAGNER,	) Case No.: SCV-252580
18 Plaintiff,)
19 v.	) NOTICE OF HEARING DATE FOR
20 SPIRE VISION LLC <i>et al.</i>	) PLAINTIFF'S MOTION TO STRIKE
21 Defendants.	) ANSWER
)
)
)

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that the Court set a hearing date of November 6, 2013 at 3:30
24 p.m. for Plaintiff Christopher Wagner's Motion to Strike the Answer filed by Defendants. A
25 copy of the Notice of Motion is attached as Exhibit A.

26 THE LAW OFFICES OF DANIEL BALSAM

27 Date: September 1, 2013

28 BY: 
29 DANIEL L. BALSAM
30 Attorneys for Plaintiff Christopher Wagner
31

Exhibit A

Timothy J. Walton (State Bar No. 184292)
 Jim C. Twu (State Bar No. 175032)
 WALTON TWU LLP
 9515 Soquel Drive, Suite 207
 Aptos, CA 95003-4137
 Phone (831) 685-9800
 Fax: (650) 618-8687

**ENDORSED
FILED**

AUG 27 2013

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA

Daniel L. Balsam (State Bar No. 260423)
 THE LAW OFFICES OF DANIEL BALSAM
 2912 Diamond Street #218
 San Francisco, CA 94131
 Phone: (415) 869-2873
 Fax: (415) 869-2873

L&M TENTATIVE RULINGS are
 available after 2:00 p.m. on the court
 day prior to the scheduled hearing:
<http://www.SonomaSuperiorCourt.com>
 OR (707) 521-6881

Attorneys for Plaintiff Christopher Wagner

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

CHRISTOPHER WAGNER,	) Case No.: SCV-252580
)
Plaintiff,	) NOTICE OF HEARING AND
	) PLAINTIFF'S MOTION TO STRIKE
v.	) DEFENDANTS' ANSWER
)
SPIRE VISION LLC <i>et al</i>,	) Code Civ. Proc. §§ 436-437
)
Defendants.	) Date: NOV - 6 2013
	) Time: 3:30 p.m.
	) Judge: Hon. Nancy Case Shaffer
	) Dept: 18

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **NOV - 6 2013**, ~~2013~~, at 3:30 p.m.,
 in Department 18 of the above-entitled court, located at 3055 Cleveland Avenue, Santa Rosa,
 California 95403 Plaintiff Christopher Wagner will and hereby does move the Court for an order
 granting his Motion to Strike portions of the Verified Answer and Affirmative Defenses
 ("Answer") filed by 18 Spire Vision entities (collectively "Spire Vision") and Accelerize New
 Media Inc. ("Accelerize") pursuant to Code of Civil Procedure §§ 436-437, as set forth below:

1. Wagner moves to strike all Defendants *except* Spire Vision LLC from the caption (1:12-23) and the introductory paragraph (1:25-2:3) because *only* Spire Vision LLC verified the Answer.
2. Wagner moves to strike affirmative defenses 1 and 3-9 because they do not indicate the cause(s) of action to which they are supposed to apply.
3. Wagner moves to strike the seventh affirmative defense ("Plaintiff has failed to join one or more necessary and indispensable parties") because it is a legal conclusion; Defendants state no facts to support the affirmative defense.
4. Wagner moves to strike the eighth affirmative defense ("Venue and jurisdiction are improper . . . grounds exist for removal to federal court") because is false, improper, and not drawn in conformity with a court order. The U.S. District Court already entertained Defendants' improper removal and granted Wagner's Motion to Remand to this Court.
5. Wagner moves to strike the ninth purported affirmative defense ("Answering Defendants reserve the right to add more defenses as discovery proceeds") because it is not drawn or filed in conformity with the laws of this state; more specifically, no such defense exists.
6. Wagner moves to strike "Attorney's fees" from Prayer for Relief ¶ B because: a) Business & Professions Code § 17529.5 awards attorneys' fees to a prevailing spam *recipient*; a spammer has no basis whatsoever to recover attorneys' fees, and b) Business & Professions Code § 17538.5 does not contain a provision for attorneys' fees.

Therefore, the Answer is objectionable on its face.

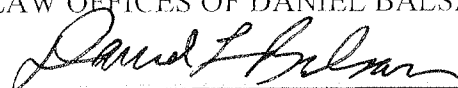
The Motion to Strike is based upon this Notice, the Motion to Strike and Memorandum of Points and Authorities, the Declaration of Daniel Balsam, all other pleadings and records on file herein, and such argument and other evidence as may be offered at the hearing.

This Court should sustain the Motion to Strike.

THE LAW OFFICES OF DANIEL BALSAM

Date: August 20, 2013

BY:



DANIEL L. BALSAM

Attorneys for Plaintiff Christopher Wagner

<i>Attorney or Party Without Attorney</i> Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 Telephone No.: 415-869-2873 Fax No.: 415-869-2873 Attorney for: Plaintiff Christopher Wagner		
<i>Insert name of Court, and Judicial District and Branch Court:</i> Superior Court of California, County of Sonoma Civil and Family Law Courthouse 3055 Cleveland Avenue Santa Rosa, CA 95403		
Plaintiff/Petitioner: Christopher Wagner Defendant/Respondent: Spire Vision LLC et al		Case Number: SCV-252580
<p style="text-align: center;">PROOF OF SERVICE – CIVIL</p> Check method of service (only one): <input type="checkbox"/> By Personal Service <input checked="" type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		Judge: Shaffer Courtroom: 18

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. My residence or business address is:
The Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131
4. On (date): September 1, 2013 I served the following **documents** (specify):
Notice of Hearing Date for Plaintiff's Motion to Strike Answer
5. I served the documents on the person or persons below, as follows:
 - a. Name of person served:
John Du Wors – attorney for Spire Vision entities, Accelerize New Media Inc.
 - b. ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)
Business or residential address where person was served:
Newman Du Wors LLP, 1201 Third Avenue, Suite 1600, Seattle, WA 98101
6. The documents were served by the following means (specify):
 - b. ☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (specify one):
(1) ☒ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state): San Francisco, CA

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Date: September 1, 2013

Daniel L. Balsam

Type or Print Name of Declarant



Signature of Declarant

PROOF OF SERVICE – CIVIL

Box 145

1 John Du Wors, State Bar No. 233913
 2 john@newmanlaw.com
 3 NEWMAN DU WORS LLP
 4 1201 Third Avenue, Suite 1600
 5 Seattle, WA 98101
 6 Telephone: (206) 274-2800
 7 Facsimile: (206) 274-2801

ENDORSED
 FILED
 SEP 09 2013
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA

6 Leeor Neta, State Bar No. 233454
 7 leeor@newmanlaw.com
 8 NEWMAN DU WORS LLP
 9 150 California Street, Suite 2100
 10 San Francisco, CA 94111
 11 Telephone: (415) 321-1818
 12 Facsimile: (415) 618-0080

13 Attorneys for Defendants

By Fax

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 15 **COUNTY OF SONOMA**

16 Christopher Wagner, an individual,

Civil Case No. SCV-252580

17 Plaintiff,

18 v.

19 Spire Vision LLC, a Delaware limited liability
 20 company, et al.,

21 Defendants.

**SUPPLEMENTAL DECLARATION
 OF LEEOR NETA REGARDING
 MEET AND CONFER
 CONFERENCE ON
 DEFENDANTS' MOTION FOR
 PROTECTIVE ORDER OR, IN
 THE ALTERNATIVE, FOR A
 STAY OF DISCOVERY AND
 IMPLEMENTATION OF A CASE
 MANAGEMENT ORDER
 (SONOMA COUNTY LOCAL
 RULE 5.4)**

Hearing Date: September 11, 2013

Hearing Time: 3:30 pm

Dept. No. 18

Judge: Hon. Nancy Case Shaffer

1 I, Leeor Neta, declare as follows:

2 1. I am an attorney with Newman Du Wors LLP, counsel for Defendants
3 Spire Vision LLC et al. I have personal knowledge of the facts set forth in this
4 declaration and could and would competently testify to them under oath if called as a
5 witness.

6 2. On Friday, September 6, I received a copy of a letter to the Court from Dan
7 Balsam, counsel for Plaintiff Christopher Wagner. This letter makes numerous
8 misstatements of fact and law and completely misrepresents the parties' meet and confer
9 efforts. In particular, Mr. Balsam has committed perjury by claiming that his "text of
10 communications" between us is a true and correct copy. Instead, it is an improper sur-
11 reply that excerpts only a small portion of the parties' exchange.

12 3. It is worth noting at the outset that Mr. Balsam's excerpt omits his rude and
13 unprofessional tone. Specifically, Mr. Balsam has yelled at me by typing in all caps
14 (http://networketiquette.net/core_rules_do_not_use_all_caps.html), ordered me to "Get a
15 grip," and accused me that I am "nuts."

16 4. Attached as **Exhibit 1** is a true and correct copy of the letters and emails
17 exchanged between Mr. Balsam and I, in chronological order. A brief review of this
18 correspondence demonstrates that Mr. Balsam has mischaracterized the parties' positions.

19 5. There are essentially two concerns that drove this exchange: (1) a
20 reasonable request to limit this proceeding to the 49 emails currently at issue, and (2) a
21 reasonable request that Plaintiff produce the 49 emails at issue so that Defendants could
22 provide a timely response as to each email.

23 6. Plaintiff flatly refused to limit this proceeding to 49 emails even though he
24 fought remand on the basis that there were only 49 emails at issue and that, as such, the
25 amount in controversy for federal diversity jurisdiction was not present. (*See Reply to*
26 *Opposition to Remand*, dated February 15, 2013, attached as **Exhibit 2** at 14:6-11.)

27 7. While Defendants want to make sure they do not continue to send Plaintiff
28 further commercial email, they cannot do that unless Plaintiff provides his email

1 addresses. In fact, that is the only way to ever guarantee that Defendants will not send
2 more spam to Plaintiff. And yet, Plaintiff refused to do even that, citing two articles that
3 simply encourage email users not to “respond to unsolicited email.” (*See* Letter from
4 Balsam, dated September 1, 2013, Exhibit B at p. 3) Defendants are not asking Plaintiff
5 to respond to the email at issue. Defendants are simply asking Plaintiff—in the context of
6 litigation—to provide his email addresses for the limited purpose of ensuring they will
7 not send him further commercial correspondence. Plaintiffs do not contend that
8 Defendants could not request these addresses through the formal discovery process. But
9 by refusing to take even this modest step, Plaintiff has frustrated Defendants efforts to
10 cease sending him unsolicited email, has undermined the intention of his lawsuit (which
11 was initiated without a formal demand), and will ensure there is “no foreseeable end to
12 these proceedings.”

13 8. Because Plaintiff was unwilling to provide his email addresses, Defendants
14 suggested that the parties agree to limit this proceeding to the 49 emails at issue and leave
15 future emails to another proceeding, if necessary. Again Plaintiff refused, claiming that
16 California Civil Code, Section 1668, prevents such an agreement. (*See* Letter from
17 Balsam, dated September 1, 2013, Exhibit B at pp. 2-3) Plaintiff misstates and misapplies
18 the law. Section 1668 prohibits agreements condoning fraud or intentional injury as
19 follows:

20 All contracts which have for their object, directly or indirectly, to exempt
21 any one from responsibility for his own *fraud*, or *willful injury* to the
22 person or property of another, or violation of law, whether *willful or*
negligent, are against the policy of the law.

23 (Emphasis added.) Section 1668 has no relevance to these proceedings. Plaintiff does not
24 claim that he was willfully, let alone negligently, defrauded by the emails, nor has
25 Plaintiff claimed a compensable injury. Plaintiff merely claims that Defendants are
26 strictly liable for sending improperly labeled emails and that he is entitled to liquidated
27 damages. If Plaintiff were willing to waive such claims, there is nothing in Section 1668
28 that would prohibit such waiver. Even so, Defendants are *not* seeking a waiver. They are

1 simply asking Plaintiff to agree—for the sake of maintaining a reasonable limit to this
2 proceeding—not to amend his complaint to include further non-tortious claims and leave
3 them for a later date, if necessary. Again, Plaintiff refused this modest step.

4 9. Mr. Balsam’s falsified excerpt of the parties’ communications fails to
5 address Defendants’ request that Plaintiff produce the 49 emails at issue. As I explained
6 in an email, dated August 28, Defendants cannot be expected to answer a single set of
7 form interrogatories for every email at issue until the emails at issue are produced:

8 It is your client’s responsibility to disclose the emails at issue. Because the
9 Court declined to consider the merits of Defendants’ demurrer, there was
10 no opportunity to discuss how Wagner failed to allege sufficient facts to
11 support his claims by failing to attach the emails to the complaint. If you
12 would rather force my clients through the exercise of demanding the emails
13 at issue, we are certainly willing to do that. But you only delay responses to
14 your discovery since the Court has already ruled that 8 Defendants should
15 answer 22 form interrogatories for every email at issue, and Defendants
16 cannot do that until they know what emails are at issue.

17 And yet, Plaintiff refused to produce the emails unless Defendants sought them through
18 formal discovery. On Thursday, September 5, the Spire Vision Defendants served
19 Plaintiff with 14 discovery requests and a deposition notice. The Spire Vision Defendants
20 suspect this will constitute *all* of the discovery necessary to resolve Plaintiff’s claims
21 with respect to all 49 emails. Once Plaintiff provides complete responses to this
22 discovery, Defendants are willing to review the emails at issue and respond to 8,624 form
23 interrogatories (22 requests x 49 emails). But a protective order or discovery referee is
24 needed with respect to Plaintiff’s remaining 6,000 special interrogatories, requests for
25 admission and requests for production which are completely unprecedented, unwarranted,
26 needlessly harassing and vexatious.

27 //

28 //

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3
4 Executed in San Francisco, California on September 9, 2013.

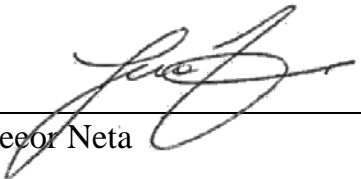
5
6
7 
8 Leeor Neta

Exhibit 1

From: [Leeor Neta](#)
To: [Dan Balsam](#)
Cc: [John Du Wors](#)
Subject: Wagner v. Spire Vision
Date: Tuesday, August 27, 2013 4:23:01 PM

Dan:

I am in receipt of your letter, dated August 22, 2013.

My concern relates to the term, "the 49 commercial email advertisements at issue in this Action." This statement, which was not part of the tentative, suggests that this suit will be limited to the 49 emails currently at issue. So I write to confirm that you will not later move to amend your complaint to add additional email messages.

Also, while my client is certainly willing to respond to discovery, we require copies of the 49 email messages at issue in order to proceed. Please confirm that you will send copies of these messages in native format as soon as possible.

Thank you,

Leeor Neta

Of Counsel

[Newman Du Wors](#)

1201 Third Ave, Ste 1600

Seattle, Washington 98101

leeor@newmanlaw.com

www.newmanlaw.com

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From: [Dan Balsam](#)
To: [Leeor Neta](#)
Cc: [John Du Wors](#); [Timothy Walton](#)
Subject: Re: Wagner v. Spire Vision
Date: Tuesday, August 27, 2013 4:47:52 PM

1. Good point, we should take out the reference to "49." Should Wagner receive more Spire Vision spams, you can bet he'll move to amend the complaint.
2. Spire Vision is "certainly willing to respond to discovery"? When did THAT happen?
3. What do you think "native format" means? Different people seem to have different interpretations of the term. I believe that "native format" means ascii text, but that's not going to include clickthrough/redirect links, and the graphics and links are almost certainly dead by now. So, what EXACTLY do you want?
4. You should propound RFPDs for the spams, and Wagner will respond with verifications in far less than 30 days. I'm disinclined to produce the spams "informally" now because you'll probably make me produce again later on so you can have verifications. So let's just do this once.

=====
Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

From: Leeor Neta <Leeor@newmanlaw.com>
To: Dan Balsam <legal@danbalsam.com>
Cc: John Du Wors <John@newmanlaw.com>
Sent: Tuesday, August 27, 2013 4:23 PM
Subject: Wagner v. Spire Vision

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Of Counsel
[Newman Du Wors](#)
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Seattle, Washington 98101

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From: [Leeor Neta](#)
To: [Dan Balsam](#)
Cc: [John Du Wors](#); [Timothy Walton](#)
Subject: RE: Wagner v. Spire Vision
Date: Wednesday, August 28, 2013 1:33:52 PM

Dan,

I respond to each of your points in order:

1. Your suggestion is not in keeping with Judge Shaffer's order. During the hearing last week, Judge Shaffer agreed that 8 Defendants should answer one set of form interrogatories (with the exception of 17.1) for every email at issue. In your proposed order, you calculate that this would result in 8,624 interrogatory responses. Defendants are certainly willing to comply with these terms. But by removing any reference to the number "49", the 8 Defendants have no way of determining how many interrogatory responses to lodge, let alone any way of fashioning a response regarding emails that are not even at issue. And Defendants have a legitimate reason to be concerned that if you amend the complaint to add additional email messages (as you are already attempting to do in another matter), that there will be no foreseeable end to these proceedings. There needs to be a reasonable limitation to this action. The Court deserves as much. My clients cannot agree to your proposed terms.

2. As described above, my clients are certainly willing to respond to discovery. On Demand Research has already responded to a host of discovery in this matter. And my clients will continue to respond to discovery that is not vexatious and harassing.

3. The emails should be made available in an electronically searchable form in order to facilitate a method of searching across all files. Thousands of printouts serve little use.

4. It is your client's responsibility to disclose the emails at issue. Because the Court declined to consider the merits of Defendants' demurrer, there was no opportunity to discuss how Wagner failed to allege sufficient facts to support his claims by failing to attach the emails to the complaint. If you would rather force my clients through the exercise of demanding the emails at issue, we are certainly willing to do that. But you only delay responses to your discovery since the Court has already ruled that 8 Defendants should answer 22 form interrogatories for every email at issue, and Defendants cannot do that until they know what emails are at issue.

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San Francisco, California 94111

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From: Dan Balsam [legal@danbalsam.com]
Sent: Tuesday, August 27, 2013 4:47 PM
To: Leeor Neta
Cc: John Du Wors; Timothy Walton
Subject: Re: Wagner v. Spire Vision

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From: [Dan Balsam](#)
To: [Leeor Neta](#)
Cc: [John Du Wors](#); [Timothy Walton](#)
Subject: Re: Wagner v. Spire Vision
Date: Wednesday, August 28, 2013 1:53:23 PM

1. First you don't want references to 49, now you do? I think I'll just say "49 as of now." You'll know how many to respond to after we provide the emails. (See #4.) That said, if your clients send more spam to Wagner, then he's entitled to amend. There's a real easy way to prevent that, and it's entirely within YOUR client's power to do so. These aren't MY terms, and I don't really care all that much if you agree to them or not. I'm prepared to send the proposed order to the court, as I think the court intended it to be based on the hearing, and I'll note your objections.

2. On Demand Research has responded to a LITTLE bit of set 2 discovery. It joined the motion for protective order as to set 1 with all the other Ds. Wagner has not propounded any vexatious and harassing discovery in this Action. The discovery is what it is because you insisted on separate discovery to each of your clients and refused various stipulations that could have reduced it.

3. I was planning on producing electronically as opposed to paper. But electronic v. paper does not address the question I asked you re: format. Apples & oranges. I can produce native format electronically if you want, but I don't think it's going to help you because graphics and links are almost assuredly all dead at this point. What CONTENT, electronically, do you want?

4. Well then you'd better hurry up and send Wagner RFPDs so you can timely comply with the court's forthcoming order. I think it would probably take you about 3 minutes to write "RFPD 1: Produce documents evidencing all alleged unsolicited commercial emails that Wagner received that are currently at issue in this Action. Documents should be produced electronically, in XXXXX format." Actually, less than 15 minutes, because I just wrote it for you. I already told you I'll respond a lot faster than 30 days.

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From: Leeor Neta <Leeor@newmanlaw.com>
To: Dan Balsam <legal@danbalsam.com>
Cc: John Du Wors <John@newmanlaw.com>; Timothy Walton <timothy.walton.47@gmail.com>
Sent: Wednesday, August 28, 2013 1:33 PM
Subject: RE: Wagner v. Spire Vision

Dan,

I respond to each of your points in order:

1. Your suggestion is not in keeping with Judge Shaffer's order. During the hearing last week, Judge Shaffer agreed that 8 Defendants should answer one set of form interrogatories (with the exception of 17.1) for every email at issue. In your proposed order, you calculate that this would result in 8,624 interrogatory responses. Defendants are certainly willing to comply with these terms. But by removing any reference to the number "49", the 8 Defendants have no way of determining how many interrogatory responses to lodge, let alone any way of fashioning a response regarding emails that are not even at issue. And Defendants have a legitimate reason to be concerned that if you amend the complaint to add additional email messages (as you are already attempting to do in another matter), that there will be no foreseeable end to these proceedings. There needs to be a reasonable limitation to this action. The Court deserves as much. My clients cannot agree to your proposed terms.

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3. The emails should be made available in an electronically searchable form in order to facilitate a method of searching across all files. Thousands of printouts serve little use.

4. It is your client's responsibility to disclose the emails at issue. Because the Court declined to consider the merits of Defendants' demurrer, there was no opportunity to discuss how Wagner failed to allege sufficient facts to support his claims by failing to attach the emails to the complaint. If you would rather force my clients through the exercise of demanding the emails at issue, we are certainly willing to do that. But you only delay responses to your discovery since the Court has already ruled that 8 Defendants should answer 22 form interrogatories for every email at issue, and Defendants cannot do that until they know what emails are at issue.

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From: Dan Balsam [legal@danbalsam.com]

Sent: Tuesday, August 27, 2013 4:47 PM

To: Leeor Neta

Cc: John Du Wors; Timothy Walton

Subject: Re: Wagner v. Spire Vision

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2. Spire Vision is "certainly willing to respond to discovery"? When did THAT happen?

3. What do you think "native format" means? Different people seem to have different interpretations of the term. I believe that "native format" means ascii text, but that's not going to include clickthrough/redirect links, and the graphics and links are almost certainly dead by now. So, what EXACTLY do you want?

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Thank you,

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From: [Leeor Neta](#)
To: [Dan Balsam](#)
Cc: [John Du Wors](#); [Timothy Walton](#)
Subject: RE: Wagner v. Spire Vision
Date: Wednesday, August 28, 2013 6:15:19 PM

Dan,

1. If your intention is to draft an order that is in keeping with the hearing, then you need to limit it to "49." As a demonstration of good faith, you should also agree not to later amend your complaint to add additional emails. But whether or not you refuse, I encourage you to provide *all* of Wagner's email addresses so that I can do my best to ensure he is sent no further email from my clients. If your client refuses to do that or at least click on the unsubscribe links, there is not much else my clients can do.

2. Your discovery *is* vexatious and harassing. Eight of my clients are willing to respond to 1,000 discovery requests each. Another of my clients has responded to multiple sets. You insist on multiple times more and insist on reserving the right to expand this lawsuit to include an unlimited number of future emails. I simply cannot see how we are not being forthcoming or how you are being reasonable.

3. The emails should be made available in an electronically searchable form in order to facilitate a method of searching across all files. In terms of "content," I think it is obvious that the emails must be disclosed.

4. If you are going to force my clients to demand the emails via discovery, that will only delay responses to your discovery.

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150 California Street, Suite 2100

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From: Dan Balsam [legal@danbalsam.com]
Sent: Wednesday, August 28, 2013 1:53 PM
To: Leeor Neta
Cc: John Du Wors; Timothy Walton
Subject: Re: Wagner v. Spire Vision

1. First you don't want references to 49, now you do? I think I'll just say "49 as of now." You'll know how many to respond to after we provide the emails. (See #4.) That said, if your clients send more spam to Wagner, then he's entitled to amend. There's a real easy way to prevent that, and it's entirely within YOUR client's power to do so. These aren't MY terms, and I don't really care all that much if you agree to them or not. I'm prepared to send the proposed order to the court, as I think the court intended it to be based on the hearing, and I'll note your objections.

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From: Dan Balsam [legal@danbalsam.com]

Sent: Tuesday, August 27, 2013 4:47 PM

To: Leeor Neta

Cc: John Du Wors; Timothy Walton

Subject: Re: Wagner v. Spire Vision

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Seattle, Washington 98101

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From: [Dan Balsam](#)
To: [Leeor Neta](#)
Cc: [John Du Wors](#); ["Timothy Walton"](#)
Subject: RE: Wagner v. Spire Vision
Date: Wednesday, August 28, 2013 6:30:52 PM

1. I intend to draft a proposed order that reflects what the Court said. As of NOW, there are 49 emails at issue. I will NOT agree that I won't amend the complaint if Wagner receives more emails. Wagner declines your invitation to provide any other email addresses he might have to such notorious and prolific spammers as the Spire Vision entities.

2. The discovery is NOT vexatious and harassing. You VOLUNTEERED to have 8 of your clients respond to 49 x 22 FROGs each. On Demand Research LLC has responded to a few questions, some with bogus answers. I offered you numerous opportunities and means to reduce the quantity of discovery. And you bet I reserve the right to expand this lawsuit to include future emails if any are sent. You frequently say "I cannot see" but that phrase doesn't carry much weight; you also "couldn't see" how the court could deny you the right to file a demurrer in state court after answering in federal court and remand, and yet, it happened.

3. You are still not answering the question, which leads me to believe that you don't actually understand what you're asking for or what you want. Let me attempt to explain. "Native format" means a bunch of ascii text. It could be produced on paper or electronically; that's not the issue. Ascii text will show "img ref=" for links to images stored on servers and "ahref=" for clickable links. Native format is not going to show graphics, and it's not going to include clickthroughs to Spire Vision's websites that will give you the tracking codes you need to identify the affiliates. But if that's what you want, you got it. Please confirm.

4. You have not explained why you can't copy & paste the line I wrote before into a RFPD, once you figure out the format that you really want. On the other hand, I have explained that I'm disinclined to produce documents twice, once now and once again when you demand Wagner's verification. My request that you propound discovery will NOT delay your responses to Wagner's discovery, because a) You're on notice now that you need to do it and it'll take you only a couple minutes to put together a SINGLE DOCUMENT REQUEST that I already mostly wrote for you, and b) Your time to respond is going to be a function of the date I serve notice of the court's entry of order.

Why must you always be so difficult?

From: Leeor Neta [mailto:Leeor@newmanlaw.com]
Sent: Wednesday, August 28, 2013 6:15 PM
To: Dan Balsam
Cc: John Du Wors; Timothy Walton
Subject: RE: Wagner v. Spire Vision

Dan,

1. If your intention is to draft an order that is in keeping with the hearing, then you need to limit it to "49." As a demonstration of good faith, you should also agree not to later amend your complaint to add additional emails. But whether or not you refuse, I encourage you to provide *all* of Wagner's email addresses so that I can do my best to ensure he is sent no further email from my clients. If your client refuses to do that or at least click on the unsubscribe links, there is not much else my clients can do.

2. Your discovery *is* vexatious and harassing. Eight of my clients are willing to respond to 1,000 discovery requests each. Another of my clients has responded to multiple sets. You insist on multiple times more and insist on reserving the right to expand this lawsuit to include an unlimited number of future emails. I simply cannot see how we are not being forthcoming or how you are being reasonable.

3. The emails should be made available in an electronically searchable form in order to facilitate a method of searching across all files. In terms of "content," I think it is obvious that the emails must be disclosed.

4. If you are going to force my clients to demand the emails via discovery, that will only delay responses to your discovery.

Leeor Neta

[Newman Du Wors](#)

150 California Street, Suite 2100

San Francisco, California 94111

leeor@newmanlaw.com

www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

From: Dan Balsam [legal@danbalsam.com]

Sent: Wednesday, August 28, 2013 1:53 PM

To: Leeor Neta

Cc: John Du Wors; Timothy Walton

Subject: Re: Wagner v. Spire Vision

1. First you don't want references to 49, now you do? I think I'll just say "49 as of now." You'll know how many to respond to after we provide the emails. (See #4.) That said, if your clients send more spam to Wagner, then he's entitled to amend. There's a real easy way to prevent that, and it's entirely within YOUR client's power to do so. These aren't MY terms, and I don't really care all that much if you agree to them or not. I'm prepared to send the proposed order to the court, as I think the court intended it to be based on the hearing, and I'll note your objections.

2. On Demand Research has responded to a LITTLE bit of set 2 discovery. It joined the motion for protective order as to set 1 with all the other Ds. Wagner has not propounded any vexatious and harassing discovery in this Action. The discovery is what it is because you insisted on separate discovery to each of your clients and refused various stipulations that could have reduced it.

3. I was planning on producing electronically as opposed to paper. But electronic v. paper does not address the question I asked you re: format. Apples & oranges. I can produce native format electronically if you want, but I don't think it's going to help you because graphics and links are almost assuredly all dead at this point. What CONTENT, electronically, do you want?

4. Well then you'd better hurry up and send Wagner RFPDs so you can timely comply with the court's forthcoming order. I think it would probably take you about 3 minutes to write "RFPD 1: Produce documents evidencing all alleged unsolicited commercial emails that Wagner received that are currently at issue in this Action. Documents should be produced electronically, in XXXXX format." Actually, less than 15 minutes, because I just wrote it for you. I already told you I'll respond a lot faster than 30 days.

=====
Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

From: Leeor Neta <Leeor@newmanlaw.com>
To: Dan Balsam <legal@danbalsam.com>
Cc: John Du Wors <John@newmanlaw.com>; Timothy Walton <timothy.walton.47@gmail.com>
Sent: Wednesday, August 28, 2013 1:33 PM
Subject: RE: Wagner v. Spire Vision

Dan,

I respond to each of your points in order:

1. Your suggestion is not in keeping with Judge Shaffer's order. During the hearing last week, Judge Shaffer agreed that 8 Defendants should answer one set of form interrogatories (with the exception of 17.1) for every email at issue. In your proposed order, you calculate that this would result in 8,624 interrogatory responses. Defendants are certainly willing to comply with these terms. But by removing any reference to the number "49", the 8 Defendants have no way of determining how many interrogatory responses to lodge, let alone any way of fashioning a response regarding emails that are not even at issue. And Defendants have a legitimate reason to be concerned that if you amend the complaint to add additional email messages (as you are already attempting to do in another matter), that there will be no foreseeable end to these proceedings. There needs to be a reasonable limitation to this action. The Court deserves as much. My clients cannot agree to your proposed terms.
2. As described above, my clients are certainly willing to respond to discovery. On Demand Research has already responded to a host of discovery in this matter. And my clients will continue to respond to discovery that is not vexatious and harassing.
3. The emails should be made available in an electronically searchable form in order to facilitate a method of searching across all files. Thousands of printouts serve little use.
4. It is your client's responsibility to disclose the emails at issue. Because the Court declined to consider the merits of Defendants' demurrer, there was no opportunity to discuss how Wagner failed to allege sufficient facts to support his claims by failing to attach the emails to the complaint. If you would rather force my clients through the exercise of demanding the emails at issue, we are certainly willing to do that. But you only delay responses to your discovery since the Court has already ruled that 8 Defendants should answer 22 form interrogatories for every email at issue, and Defendants cannot do that until they know what emails are at issue.

Leeor Neta

[Newman Du Wors](#)

150 California Street, Suite 2100

San Francisco, California 94111

leeor@newmanlaw.com

www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

From: Dan Balsam [legal@danbalsam.com]
Sent: Tuesday, August 27, 2013 4:47 PM
To: Leeor Neta
Cc: John Du Wors; Timothy Walton
Subject: Re: Wagner v. Spire Vision

1. Good point, we should take out the reference to "49." Should Wagner receive more Spire Vision spams, you can bet he'll move to amend the complaint.
2. Spire Vision is "certainly willing to respond to discovery"? When did THAT happen?
3. What do you think "native format" means? Different people seem to have different interpretations of the term. I believe that "native format" means ascii text, but that's not going to include clickthrough/redirect links, and the graphics and links are almost certainly dead by now. So, what EXACTLY do you want?
4. You should propound RFPDs for the spams, and Wagner will respond with verifications in far less than 30 days. I'm disinclined to produce the spams "informally" now because you'll probably make me produce again later on so you can have verifications. So let's just do this once.

=====

Dan Balsam
Sue a Spammer! www.DanHatesSpam.com

From: Leeor Neta <Leeor@newmanlaw.com>
To: Dan Balsam <legal@danbalsam.com>
Cc: John Du Wors <John@newmanlaw.com>
Sent: Tuesday, August 27, 2013 4:23 PM
Subject: Wagner v. Spire Vision

Dan:

I am in receipt of your letter, dated August 22, 2013.

My concern relates to the term, "the 49 commercial email advertisements at issue in this Action." This statement, which was not part of the tentative, suggests that this suit will be limited to the 49 emails currently at issue. So I write to confirm that you will not later move to amend your complaint to add additional email messages.

Also, while my client is certainly willing to respond to discovery, we require copies of the 49 email messages at issue in order to proceed. Please confirm that you will send copies of these messages in native format as soon as possible.

Thank you,
Leeor Neta
Of Counsel

[Newman Du Wors](#)

1201 Third Ave, Ste 1600
Seattle, Washington 98101

leeor@newmanlaw.com

www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

From: [Dan Balsam](#)
To: [Leeor Neta](#)
Cc: [John Du Wors](#); ["Timothy Walton"](#)
Subject: Wagner Proposed Order
Date: Friday, August 30, 2013 4:14:11 PM
Importance: High

So are we agreed that the sentence in dispute can say:

Nevertheless, this Court accepts Defendants' offer that each of those eight defendants (Achieve Opportunities, AgreeWizard, FurturesDrive, JunctionLights, Opportunity Central, Paths Direct, PullSmart, YourAdsHere) will respond to a set of form interrogatories (except for 17.1) for each of the 49 commercial email advertisements at issue in this Action as of now, for a total of $8 \times 22 \times 49 = 8,624$ interrogatories.

From: [Leeor Neta](#)
To: [Dan Balsam](#)
Cc: [John Du Wors](#); [Timothy Walton](#)
Subject: Re: Wagner Proposed Order
Date: Friday, August 30, 2013 6:00:58 PM

No. You should:

1. Stipulate not to amend your complaint to add additional emails;
2. Help my clients make sure that Wagner receives no further email; *and*
3. Include language in the proposed order providing that discovery responses are contingent upon your production of the 49 emails.

Sent from my iPhone

On Aug 30, 2013, at 4:14 PM, "Dan Balsam" <legal@danbalsam.com> wrote:

[So are we agreed that the sentence in dispute can say:](#)

Nevertheless, this Court accepts Defendants' offer that each of those eight defendants (Achieve Opportunities, AgreeWizard, FurturesDrive, JunctionLights, Opportunity Central, Paths Direct, PullSmart, YourAdsHere) will respond to a set of form interrogatories (except for 17.1) for each of the 49 commercial email advertisements at issue in this Action as of now, for a total of $8 \times 22 \times 49 = 8,624$ interrogatories.

From: [Dan Balsam](#)
To: [Leeor Neta](#)
Cc: [John Du Wors](#); ["Timothy Walton"](#)
Subject: RE: Wagner Proposed Order
Date: Friday, August 30, 2013 6:42:10 PM

1. Get a grip, Leeor. If you actually think that I'm going to let you squeeze a limit on Wagner's right to amend his complaint into the order on your motion for a protective order, you're nuts.
2. That's your clients' problem, not Wagner's.
3. That also was not part of the tentative order. If you want Wagner to produce the emails then, as I've told you repeatedly, propound a single RFPD, that I've already written for you. And, I'll point out, you STILL haven't addressed your lack of understanding as to what format you really want & need.

From: Leeor Neta [mailto:Leeor@newmanlaw.com]
Sent: Friday, August 30, 2013 6:01 PM
To: Dan Balsam
Cc: John Du Wors; Timothy Walton
Subject: Re: Wagner Proposed Order

No. You should:

1. Stipulate not to amend your complaint to add additional emails;
2. Help my clients make sure that Wagner receives no further email; *and*
3. Include language in the proposed order providing that discovery responses are contingent upon your production of the 49 emails.

Sent from my iPhone

On Aug 30, 2013, at 4:14 PM, "Dan Balsam" <legal@danbalsam.com> wrote:

[So are we agreed that the sentence in dispute can say:](#)

Nevertheless, this Court accepts Defendants' offer that each of those eight defendants (Achieve Opportunities, AgreeWizard, FurturesDrive, JunctionLights, Opportunity Central, Paths Direct, PullSmart, YourAdsHere) will respond to a set of form interrogatories (except for 17.1) for each of the 49 commercial email advertisements at issue in this Action as of now, for a total of $8 \times 22 \times 49 = 8,624$ interrogatories.

Exhibit 2

Timothy J. Walton (State Bar No. 184292)

Jim C. Twu (State Bar No. 175032)

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Attorneys for Plaintiff

CHRISTOPHER WAGNER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (OAKLAND DIVISION)

CHRISTOPHER WAGNER,

Plaintiff,

vs.

SPIRE VISION LLC *et al*,

Defendants.

) Case No. 4:13-cv-00054 (YGR)

)

) **PLAINTIFF'S REPLY TO**
) **DEFENDANTS' OPPOSITION TO**
) **PLAINTIFF'S MOTION TO REMAND**
) **TO CALIFORNIA SUPERIOR COURT,**
) **AND REQUEST FOR COSTS [28 U.S.C.**
) **§ 1447(c)]**

)

) Date: Mar. 5, 2013

) Time: 2:00 p.m.

) Courtroom: 5, 2nd Floor

) Judge: Hon. Yvonne Gonzales Rogers

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I. INTRODUCTION

Spire Vision LLC removed this Action from the Superior Court of California, County of Sonoma, claiming diversity. Plaintiff Christopher Wagner (“Wagner”) filed a [Renewed] Motion to Remand (Docket #14) because there are California Parties on both sides, Spire Vision did not allege that the amount in controversy exceeded \$75,000 at the time of removal, and Spire Vision failed to obtain consent to remove from all of the Defendants who had been served.

In between unwarranted and inaccurate personal attacks at Daniel Balsam (“Balsam”), one of Wagner’s attorneys, Spire Vision’s Opposition (Docket #43) spins a tangled web of falsities to attempt to justify federal jurisdiction. The Opposition is supported by no less than five declarations, but nothing in the Opposition changes the underlying facts. This Court should see through Spire Vision’s malarkey, remand this Action to state court, and award Wagner his attorneys’ fees.

II. STATEMENT OF FACTS

Wagner incorporates by reference the Statement of Facts from his Motion to Remand at 3:20-4:9 and adds the following facts:

Wagner first approached Balsam to ask for representation in suing unlawful spammers, not the other way around. Difficult as it may be for Spire Vision to conceive, Wagner is an independent individual, and not a proxy for Balsam, *see* Opposition at 1:3 and 2:2-8, and Wagner developed his dislike for unlawful spam entirely without Balsam’s aid. Declaration of Christopher Wagner (“Wagner Decl.”) at ¶ 2.

Notwithstanding Spire Vision’s Opposition at 2:6-8, Balsam has never “bilked” spammers out of any money, whether acting on his own behalf or while representing clients. Balsam and his clients (including Wagner) have done nothing more than exercise the rights granted to them by the California Legislature via California Business & Professions Code

§ 17529.5 (“Section 17529.5”) to make claims against unlawful spammers. Declaration of Daniel Balsam (“Balsam Decl.”) at ¶ 2, Wagner Decl. at ¶ 2.

On September 13, 2012, Judge Hamilton *initially* dismissed Riley’s counter-claims under Section 17529.5 in the matter of *Davison Design & Development Inc. v. Riley*, No. 4:13-cv-02970 (PJH), currently pending in the Northern District of California, but she did not apply Ninth Circuit precedent.¹ The Declaration of John Du Wors at ¶ 6 (Docket #47) and the Opposition at 3:9-12 attempt to mislead this Court by omitting the fact that on January 16, 2013, Judge Hamilton denied Spire Vision’s Motion for Summary Judgment *and* partially reversed her previous order when she orally stated that Riley’s claims were *not* entirely preempted, and that she would allow Riley to reinstate some of her claims that were previously dismissed. Judge Hamilton has not yet issued a written order. Balsam Decl. at ¶ 3.

On January 10, 2013, Balsam sent an email to Spire Vision’s attorney Leeor Neta stating that this federal Court does not have jurisdiction in this matter and demanding that Spire Vision *immediately* stipulate to remand to state court; otherwise Wagner would move to remand and seek attorneys’ fees and costs. *See* Declaration of Leeor Neta, Exhibit H (Docket #46-8). Neta asked for a week to obtain the other Defendants’ assent, which is rather suspect in light of the fact that Spire Vision LLC did not obtain the other Defendants’ consent to remove the Action in the first place, *infra*. Neta did not immediately stipulate to remand, so Wagner filed his Motion to Remand shortly thereafter as he warned he would do. Balsam Decl. at ¶ 4.

¹ Based on markedly different facts, the Ninth Circuit case to which Spire Vision refers, *Gordon v. Virtumundo*, 575 F.3d 1040 (9th Cir. 2009), ruled that the federal CAN-SPAM Act preempted Washington’s anti-spam law not based on the question of whether the exception to preemption is based on fraud or falsity, but rather because Washington’s anti-spam law was overbroad, prohibiting even truthful spam. In contrast, Section 17529.5 is limited to false and misleading spam. *See Asis Internet Services v. SubscriberBase Inc.*, No. 09-3503 SC, 2010 U.S. Dist. LEXIS 33645 at *31-32 (N.D. Cal. Apr. 1, 2010).

III. DISCUSSION

A. Spire Vision Is Wrong About Numerous Facts

Spire Vision begins its Opposition by attacking one of Wagner’s attorneys. Spire Vision proceeds to refer to Balsam throughout, even though Balsam is neither a Party to this Action nor the only attorney representing Wagner. Wagner is not a proxy for anybody. Wagner wanted to sue Spire Vision for its unlawful spamming and he chose his attorneys carefully.

Spire Vision’s counsel have accused another member of the California State Bar of “bilking” money from the email marketing industry and wasting court resources. Opposition at 2:6-8 and Du Wors Decl. at ¶ 2 (Docket #47). They provide no factual support, much less evidence, but simply attempt to smear Balsam’s name. Similarly, they misrepresent the nature of the *Davison* action. Neither the plaintiffs nor the claims are similar, much less identical, and the judge in that case has indicated on the record that she is reversing her decision about claims against Spire Vision, as well as denying Spire Vision’s motion for summary judgment.

Spire Vision is also mistaken in asserting that all torts require reliance and damages. But the issue now before this Court is whether to remand.

As much as Spire Vision would love to tell this Court what it “must do,” Judge Hamilton’s unpublished ruling in the *Davison* action is *not* preclusive on *this* Court. *See* Opposition at 1:8, 8:22, and 12:13-14. This Court is *not* bound by the ruling of another District Court judge. In fact, if Spire Vision were correct that one District Court’s ruling is binding on another, then Judge Hamilton and this Court would both be bound by the earlier rulings of at least three District Courts from the Northern District of California,² all *after* the Ninth Circuit’s

² *Asis Internet Services v. Member Source Media LLC*, No. C-08-1321 EMC, 2010 U.S. Dist. LEXIS 47865 (N.D. Cal. Apr. 20, 2010); *Asis v. SubscriberBase*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852 (N. D. Cal. Dec. 4, 2009) (order granting defendants’ motion to dismiss);

1 ruling in *Gordon*, that ruled that spam recipients' claims under Section 17529.5 are *not*
 2 preempted by the federal CAN-SPAM Act.

3 Spire Vision did not obtain consent to removal from all Defendants who had been served
 4 at the time. Indeed, Spire Vision *still* has not obtained everyone's consent. Spire Vision
 5 attempts to explain away its failure to obtain EverydayFamily Inc., Insite Marketing Group LLC,
 6 and Zulu Marketing LLC's consent by suggesting that those Defendants do not even exist.
 7 Opposition at 9:7. However, all three have been served, and Wagner's attorneys have had
 8 conversations with representatives of EverydayFamily and Zulu Marketing. Balsam Decl. at
 9 ¶¶ 5-6 and Ex. A, Walton Decl. at ¶ 2.

10 Spire Vision claims that Wagner seeks to avoid the *purportedly* preclusive ruling of
 11 another District Court Judge, when in fact it is trying to avoid the *actually* preclusive rulings of
 12 two California State Courts of Appeal.

13 **B. Spire Vision Did Not Obtain Consent From All Defendants Prior to Removal, and Still**
 14 **Has Not Obtained Their Consent to Removal**

15 All defendants who have been joined and served in a state court action must join or
 16 consent to remove the action to federal court. 28 U.S.C. § 1446(b)(2)(A).

17 The "failure" of all Defendants in this Action to consent to removal is *not* a "mere
 18 procedural defect." Opposition at 8:27. Spire Vision's claim that "*nearly* every identifiable co-
 19 defendant that has not settled with Wagner has now joined in the removal," Opposition at 9:21-
 20 22 (emphasis added) is insufficient, as it does not comply with the "Rule of Unanimity," which
 21 "has traditionally required that *all* defendants consent to, or join in, removal." *United Steel v.*
 22 *Shell Oil Company*, 549 F.3d 1204, 1208 (9th Cir. 2008) (emphasis added).

23
 24 *Hoang v. Reunion.com Inc.*, No. C-08-3518 MMC, 2010 U.S. Dist. LEXIS 34466 (N.D. Cal.
 Mar. 31, 2010) (order . . . denying defendants' motion to dismiss first amended complaint).

As noted in Wagner's Motion to Remand, Wagner served all Defendants before Spire Vision LLC removed this Action to federal court. LeadRival did not consent to removal before Wagner dismissed it. Declaration of Daniel Balsam in Support of Motion to Remand at ¶ 7 and Ex. F. (Docket #14-1). EverydayFamily Inc., Insite Marketing Group LLC, and Zulu Marketing LLC did not consent prior to removal, and *still* have not consented as of February 15, as Wagner files this Reply. Spire Vision makes the argument that "Wagner offers no evidence that these entities still exist," Opposition at 9:7, but all three have been served, and Wagner's attorneys have had conversations with representatives of EverydayFamily Inc. and Zulu Marketing LLC. Balsam Decl. at ¶¶ 5-6 and Ex. A, Walton Decl. at ¶ 2.

Furthermore, Spire Vision's attempt to gloss over the fact that EverydayFamily, Insite Marketing Group, and Zulu Marketing did not consent to removal by claiming that they were not advertiser clients during the operative time period, Opposition at 9:7-9 and Declaration of Daniel Berger at ¶¶ 13-15 (Docket #44), does not comport with the facts:

- Wagner received six spams advertising EverydayFamily from May 4-12, 2012. Three spams were sent from the domain names *themagnify.net*, *theinitial.net*, and *thetraction.net*, which are registered to YourAdsHere, and Spire Vision admits it owns the domain name. Verified Complaint at ¶¶ 67-69, Balsam Decl. at ¶ 7 and Ex. B, and Opposition at 4:17. Three spams were sent from the domain names *eprimary.net*, *myimpactful.net*, and *thededicatedblog.com*, which are registered to FurturesDrive [sic], which Spire Vision admits is one of its "brands." Verified Complaint at ¶¶ 67-69, Balsam Decl. at ¶ 8 and Ex. C, and Opposition at 4:3.
- Wagner received one spam advertising Insite Marketing Group on April 20, 2012, sent from the domain name *mycircumstances.com*, which is registered to AgreeWizard, which Spire Vision admits is one of its "brands." Verified Complaint at ¶¶ 61-63, Balsam Decl. at ¶ 9 and Ex. D, and Opposition at 3:27.
- Wagner received three spams advertising Zulu Marketing on May 5-7, 2012. Two were sent from the domain names *eprglobal.com* and *engagementtarget.com*, which are registered to PullSmart, which Spire Vision admits is one of its "brands." Verified Complaint at ¶¶ 79-81, Balsam Decl. at ¶ 10 and Ex. E, and Opposition at 4:11. One was sent from the domain name *eproductiveblog.com*, which is registered to AgreeWizard, which Spire Vision admits is one of its

“brands.” Verified Complaint at ¶¶ 79-81, Balsam Decl. at ¶ 11 and Ex. F, and Opposition at 3:27.

C. There are Proper California Defendants, and Spire Vision Admits There is No Geographic Diversity

1. Spire Vision Itself is Located in California

Spire Vision’s boldfaced section heading states that “*Nearly Every Single Defendant is Diverse.*” Opposition at 3:23 (emphasis added). Thus, Spire Vision admits that there is not *complete* diversity, as is required for federal jurisdiction. *See* 28 U.S.C. § 1332(a)(1).

Wagner sued 18 Spire Vision Defendants in this Action, including “JunctionLights” and “YourAdsHere,” business entities of unknown organization, which claim business addresses in Rosemead, California. Verified Complaint at ¶¶ 27, 31 and Balsam Decl. at ¶ 12 and Ex. G.

Spire Vision admits that eight of the Spire Vision Defendants, including JunctionLights and YourAdsHere – are “brands” or “mere domain names” owned by Spire Vision... not “true entities.” Opposition at 3:26-4:27. Therefore, by Spire Vision’s own admission, since JunctionLights and YourAdsHere are *not* legal companies but rather brands or domain names, then logically Spire Vision *itself* is located in California, defeating geographic diversity.

2. Advertising Networks Accelerize New Media Inc. and Adconion Inc. are Proper California Defendants

Hypertouch v. ValueClick Inc. et al expressly held that advertisers are strictly liable for unlawful spamming by their agents. 192 Cal. App. 4th 805, 820-21, 829 (2d Dist. 2011).

Balsam v. Trancos Inc. et al also held that advertisers’ contracted agents are liable for unlawful spams when it affirmed the trial court’s judgment against Trancos; plaintiff had dismissed the advertisers prior to trial. 203 Cal. App. 4th 1083, 1088 (1st Dist. 2012), *petition for review denied*, 2012 Cal. LEXIS 4979 (Cal. May 23, 2012), *petition for certiori denied*, 2012 U.S.

LEXIS 8423 (U.S. Oct. 29, 2012), *petition for rehearing denied*, 2013 U.S. LEXIS 243 (U.S. Jan. 7, 2013).

Wagner did describe Accelerize New Media Inc. (“Accelerize”) and Adconion Inc. (“Adconion”) as “middlemen” in the Verified Complaint at ¶¶ 34-35, *see* Opposition at 5:10-13, by which Wagner meant that: a) Spire Vision (Juniper Marketing LLC) hired Accelerize, and Accelerize hired Adconion, and Adconion outsourced to others to actually hit the send button, or b) Spire Vision (On Demand Research LLC) hired Accelerize to send the spams, and Accelerize outsourced to Spire Vision (AgreeWizard, Opportunity Central, Paths Direct, and YourAdsHere) to actually hit the send button. Wagner did *not* concede that neither Accelerize nor Adconion sent or advertised in the emails he received. *Id.* Verified Complaint at ¶¶ 34-35. Wagner implicitly alleged agent-principal liability, and expressly alleged joint and several liability. *Id.*

By claiming that Accelerize and Adconion are “sham” defendants, Opposition at 1:9, Spire Vision is in effect arguing that even though both the advertiser (at the top of the ladder) and the spammer (at the bottom of the ladder) are undisputedly liable for unlawful spamming, the networks whom Spire Vision hired and who in turn hired the spammers are somehow *not* liable. Such an argument has little merit, particularly because agent-principal liability is a “vertical” concept, and it is difficult to conceive how liability can flow “up the ladder” with a *non*-liable party in between the bottom and top rungs, breaking the flow of liability.

Even if Accelerize could avoid liability for the unlawful spams on a vertical agent-principal theory (Wagner has dismissed Adconion), Wagner could amend the Verified Complaint to allege that Accelerize is liable on the basis of civil conspiracy. Indeed, for the nine of the spams, Spire Vision hit the send button, and a recipient who clicked the links in these spams would be redirected through Accelerize dba *cktrk.net* and land at On Demand Research LLC’s

website. Verified Complaint at ¶¶ 86-94. Accelerize knew with whom it was contracting, and the spam links would not have functioned without Accelerize's participation.

Wagner is not aware of any California Court of Appeal cases specifically addressing the liability of entities such as Accelerize and Aconion under substantive California law, but Wagner submits as persuasive authority a trial court order in the matter of *Infinite Monkeys & Co., LLC v. Global Resource Systems Corp.*, which stated that *all parties* involved in spamming are liable.

The Court finds that the Legislature intended the phrase "advertise in a commercial e-mail advertisement" contained in Business and Professions Code § 17529.5(a) to be construed broadly and to include all entities involved in the creation and dissemination of an e-mail advertisement. Thus the entity that sponsored a commercial email-advertisement, the parties that prepared and organized the dissemination of the advertisement, and the parties that effected delivery of the e-mail to recipients are all proper defendants in a Business & Professions Code § 17529.5(a) cause of action. Any other construction of the statute would . . . fail to achieve the Legislative purpose stated in Business & Professions Code § 17529.

No. 1-05-CV039918 at *1-2 (Super. Ct. Cal. Cty. of Santa Clara Sep. 14, 2005) (order re: demurrer, motion to strike, and motion for preliminary injunction). *See* Balsam Decl. at ¶ 13 and Ex. H. Wagner's Motion to Remand is not the proper vehicle to fully argue Accelerize and Adconion's liability on the merits, but Wagner points to *Infinite Monkeys* to show that it is *possible* that a trial court could find them liable. This possibility is sufficient to require remand, so there is no fraudulent joinder, as discussed below.

In *Hunter v. Philip Morris USA*, the Ninth Circuit cited a Fifth Circuit case with approval, holding that

"The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper." . . . "[I]f there is any possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the federal court cannot find that joinder of the resident defendant was fraudulent, and remand is necessary."

582 F.3d 1039, 1044 (9th Cir. 2009) (citations omitted). Similarly:

The removing defendant's burden of demonstrating that the non-diverse defendant's joinder is a "sham" is a heavy one. In determining whether a non-diverse defendant's joinder is fraudulent, the court must resolve all disputed questions of fact, and all ambiguities in the controlling state law, in favor of the non-removing party. All doubts concerning the sufficiency of a cause of action because of inartful, ambiguous or technically defective pleading must be resolved in favor of remand, and a lack of clear precedent does not render the joinder fraudulent.

Applying these standards, if there is even a possibility that plaintiff may prevail, remand is warranted. "The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court . . .". The court's job is not to determine whether the plaintiff will actually or even probably prevail on merits of his claim, but rather to evaluate whether there is any possibility plaintiff may do so. For this reason, merely showing that an action is likely to be dismissed as against the purported "sham" defendant does not demonstrate fraudulent joinder. . . .

Archuleta v. American Airlines, Inc., 2000 U.S. Dist. LEXIS 21076 at *16-17 (C.D. Cal. May 8, 2000) (citations omitted). And, just four months ago in the Northern District:

The defendant seeking removal based on fraudulent joinder must do more than show that the complaint at the time of removal fails to state a claim against the non-diverse defendant, but must show that there is no possibility that the plaintiff could prevail on any cause of action it brought against the non-diverse defendant.

. . . Given Defendants' heavy burden of persuasion and the presumption against finding fraudulent joinder, Defendants have not demonstrated that Parker is a fraudulently joined defendant. Plaintiff's motion to remand is therefore granted.

Birkhead v. Parker, 2012 U.S. Dist. LEXIS 148854 at *9-10 (N.D. Cal. Oct. 15, 2012).

Accelerize attempts to separate itself altogether from the spams at issue in this Action, but the Declaration by Damon Stein, general counsel for a division of Accelerize (Docket #45), does not achieve that goal. First, Stein claims that it sold its online marketing division in September 2012, but even if true, it is irrelevant, because Wagner received the spams involving Accelerize from May-July 2012. Verified Complaint at ¶¶ 86-94 and 105-111.

Second, Wagner disputes Stein's claim that Accelerize has no relation to the facts alleged in this lawsuit. After a recipient clicks the links in some of the spams at issue, s/he is redirected

through *cktrk.net* en route to landing pages belonging to Juniper Marketing LLC or On Demand Research LLC (Spire Vision companies). Verified Complaint at ¶¶ 86-94 and 105-107; Balsam Decl. at ¶ 14 and Ex. I. *Cktrk.net* was proxy-registered to hide the identity of the operator of the domain name, but Domains By Proxy Inc. (which, incidentally, prohibits all use of its services for spamming) identified Accelerize as the registrant of the domain name. Balsam Decl. at ¶ 15 and Ex. J-K. By its own admission, Accelerize makes it “so easy for our customers to target their campaigns based on location, mobile device and traffic source” and its “suppression list management integrates with third party solutions.” Balsam Decl. at ¶ 16 and Ex. L. Therefore, Accelerize admits to sending, assisting with sending, or conspiring to send commercial emails, because campaign targeting and list suppression are both part of the sending process.

Infinite Monkeys suggests that a trial court may find Accelerize (and Adconion, if Wagner hadn’t already dismissed it) liable for its role in the unlawful spamming at issue in this Action, so Wagner maintains that Accelerize is a proper Defendant. If there is *any* possibility that Wagner can establish liability against Accelerize under Cal. Business & Professions Code § 17529.5, this Court should remand. *See also Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318-19 (9th Cir. 1998).

3. *LifeScript Inc. is Not Fraudulently Joined*

Spire Vision claims that it does not own the domain name *targetedspecials.com*, and that *targetedspecials.com* is not associated with Spire Vision’s Commission Wizard affiliate network, Opposition at 12:8-27, and therefore the LifeScript spams have nothing to do with Spire Vision.

However, a visit to the *www.targetedspecials.com* website shows that it is, in fact, Spire Vision’s Commission Wizard affiliate network. In fact, the *www.targetedspecials.com* website displays Spire Vision’s logos, trademarks, and copyright notice. Balsam Decl. at ¶ 17 and Ex. M. Moreover, the *www.commissionwizard.com*, *www.targetedspecials.com*, and *www.ondemand*

1 *affiliates.com* websites (the latter presumably related to On Demand Research LLC, a Spire
 2 Vision company) are all on hosted on the same server located at IP address 67.215.174.103.
 3 Balsam Decl. at ¶ 18 and Ex. N.

4 **D. Spire Vision Has Not Established That Wagner’s Claims Exceed \$75,000**

5 ***1. Attorneys’ Fees are Calculated at the Time of Removal***

6 For a federal court to have jurisdiction, in addition to complete geographic diversity, the
 7 amount in controversy must also exceed \$75,000. 28 U.S.C. § 1332(a). Wagner and Spire
 8 Vision agree that attorneys’ fees are included in the calculation, *but* Spire Vision argues that

9 There is no support for [Wagner’s] position [] that the amount in controversy
 10 includes only those damages and attorneys’ fees already incurred at the time of
 11 filing.

11 Opposition at 13:22-23. Spire Vision is wrong; Wagner does have support.

12 “Removal jurisdiction requires complete diversity both at the time of commencement of
 13 the action [*and*] *at the time of removal*; both must be alleged in the notice of removal.” *Awasthi*
 14 *v. Infosys Technologies Ltd.*, 2010 U.S. Dist. LEXIS 57824 at *21-22 (N.D. Cal. May 21, 2010)
 15 (emphasis added). “The amount in controversy is determined as of the date of removal. A
 16 speculative argument as to the amount in controversy is insufficient.” *Faulkner v. Astro-Med*
 17 *Inc.*, 1999 U.S. Dist. LEXIS 15801 at *5 (N.D. Cal. Oct. 1, 1999).

18 In *Valdez v. Allstate Insurance. Company*, the Ninth Circuit held that

19 Since “it [was] not facially evident from the complaint that more than \$ 75,000
 20 [was] in controversy,” Allstate should have “proven, by a preponderance of the
 21 evidence, that the amount in controversy [met] the jurisdictional threshold.” []
 22 Allstate did not. Its only effort was the statement in its “Petition for Removal”
 23 that “upon information and belief, [it] submits that the amount in controversy . . .
 24 exceeds \$ 75,000.00.” “Information and belief” hardly constitutes proof “by a
 preponderance of the evidence.” [] “Conclusory allegations as to the amount in
 controversy are insufficient.” To discharge its burden, Allstate needed to
 “provide evidence establishing that it is ‘more likely than not’ that the amount in
 controversy exceeds that amount.” . . . [A] conclusory allegation “neither
 overcomes the ‘strong presumption’ against removal jurisdiction, nor satisfies [the

defendant]’s burden of setting forth, in the removal petition itself, the *underlying facts* supporting its assertion that the amount in controversy exceeds” the applicable dollar value.

372 F.3d 1115, 1117 (9th Cir. 2004) (citations omitted; emphasis in original).

Here, Spire Vision’s Notice of Removal at ¶ 8 (Docket #4) claims that “Plaintiff’s fee claim *potentially* exceeds \$26,000, causing the amount in controversy to exceed \$75,000” (emphasis added). Spire Vision failed to state facts in support of its conclusory assumption. Spire Vision did not allege that the amount in controversy – including Wagner’s attorneys’ fees *at that time* – exceeded \$75,000; therefore, there was not complete diversity.

Spire Vision’s citation in its Opposition at 13:26-14:2 to *Celestino v. Renal Advantage Inc.*, 2007 U.S. Dist. LEXIS 33827 (N.D. Cal. Apr. 24, 2007) (order denying plaintiff’s motion to remand) does not help its position. While the order does include the quoted text – “[T]he amount in controversy includes not only damages accrued up to the time of removal, but also a reasonable assessment of damages likely to be accrued,” *id.* at *11, Spire Vision incorrectly reads *damages* as if it said *attorneys’ fees*. In fact, the court noted that at the time of removal, Celestino had already claimed a loss of *income and benefits* exceeding \$55,000 and stated that he would be out of work for six months, costing him more than \$39,000 in future loss of *income and benefits*. *Id.* at *11-12. Thus, the ruling had nothing to do with anticipated *attorneys’ fees*.

Wagner admits that in *Simmons v. PCR Technology*, 209 F. Supp. 2d 1029, 1034 (N.D. Cal. 2002), the District Court included anticipated attorneys’ fees to determine the amount in controversy. *See* Opposition at 13:25-26. However, Wagner points out that the *Simmons* court reached its conclusion based on *Galt G/S v. JSS Scandinavia*, 142 F. 3d 1150 (9th Cir. 1998), and in *Galt G/S*, federal subject matter jurisdiction depended on the fact that one party was claiming \$13,500 plus \$44,266.65 in attorneys’ fees *actually incurred*, such that the total exceeded the \$50,000 threshold amount in controversy *at the time of removal*. *Id.* at 1155.

Moreover, *Simmons* is a District Court case from 2002, and Wagner noted in his Motion to Remand that two newer Ninth Circuit cases – *Abrego v. Dow Chemical Company*, 443 F.3d 676, 690 (9th Cir. 2006) and *Kroske v. US Bank Corporation*, 432 F.3d 976, 980 (9th Cir. 2005) – support his position that the amount in controversy depends on attorneys’ fees at the time of removal. *See also Singer v. State Farm Mutual Auto Insurance Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (ruling that the amount in controversy is determined at the time of removal).

Spire Vision attempts to include Wagner’s attorneys’ time spent seeking remand and several others [sic] motions into the amount in controversy. Opposition at 14:11-14. But as established above, this time is irrelevant; because those hours were spent *after* Spire Vision had already removed this Action. The only thing that Wagner’s attorneys did prior to removal was prepare, file, and serve the Verified Complaint. *See Green v. Party City Corp.*, 2002 U.S. Dist. LEXIS 7750 at *7 and n.3 (C.D. Cal. Apr. 9, 2002) (noting that the amount of fees incurred up to the point of removal is *de minimus* . . . because the only work done by plaintiff’s counsel prior to removal was the filing of the complaint).

A 2012 quote from the Central District of California best sums up this subsection:

While the Ninth Circuit Court of Appeals has not yet spoken on the issue, the Court notes that it appears that a nascent consensus may be emerging among the district courts of this Circuit, finding that *attorneys’ fees not yet incurred may not be included in the amount in controversy calculation*. *See Reames v. AB Car Rental Servs.*, 2012 U.S. Dist. LEXIS 31956 (D. Or. Feb. 2, 2012) (split among the Ninth Circuit is best resolved by adoption of the reasoning that attorney fees anticipated but unaccrued at the time of removal are not properly in controversy for jurisdictional purposes).

MIC Philberts Investments v. American Casualty Company of Reading, 2012 U.S. Dist. LEXIS 80651 at *16 (E.D. Cal. June 8, 2012) (emphasis added).

1 **2. *Spire Vision Knew that Wagner Dismissed Two Defendants Before Removal,***
 2 ***Reducing Wagner's Claims from \$64,000 to \$50,500***

3 Furthermore, Spire Vision's math is incorrect, because Spire Vision knew that Wagner
 4 had dismissed two Defendants before removal. Spire Vision's attorney Neta stated that shortly
 5 after learning of this Action, and *before* removing the Action, he learned that Wagner had
 6 dismissed Adconion and AdHarmonics Inc. Neta Decl. at ¶¶ 2-3 (Docket #46).

7 Of the 49 spams at issue in this Action, 11 involved Adconion and one of those 11 also
 8 involved AdHarmonics. Verified Complaint at ¶¶ 55-60 and 105-111. Wagner seeks the
 9 statutory remedy of \$1,000 per spam pursuant to Section 17529.5. *Id.* at ¶¶ 7, 153. By
 10 dismissing those two Defendants, who accounted for 11 spams, Wagner reduced the amount in
 11 controversy under Section 17529.5 by \$11,000 to **\$38,000** before removal.

12 Furthermore, Spire Vision dba JunctionLights sent the Adharmonics/Adconion spam, and
 13 JunctionLights claims its address to be a box at the branch of The UPS Store in Rosemead,
 14 California. *Id.* at ¶¶ 55, 57 and Balsam Decl. at ¶ 12 and Ex. G. Thus, this spam constituted one
 15 of Wagner's six claims for violations of Section 17538.5, which carries a civil fine of \$2,500 per
 16 violation. *Id.* at ¶¶ 164-165. By dismissing the Adharmonics/Adconion spam, Wagner reduced
 17 the amount in controversy under Section 17538.5 by \$2,500 to **\$12,500** before removal.

18 In short, whereas Spire Vision claims the amount in controversy was **\$64,000** for
 19 liquidated damages and civil fines at the time of removal (not including punitive damages,
 20 disgorgement of profits, and attorneys' fees, which were and still are entirely speculative and
 21 thus not included in the amount in controversy for jurisdictional purposes), the amount in
 22 controversy was actually **\$50,500**. Spire Vision does not claim that Wagner incurred more than
 23 \$24,500 for attorneys' fees for writing, filing, and serving the Verified Complaint, such that the
 24 amount in controversy at the time of removal exceeded \$75,000.

E. This Court Should Award Wagner His Attorneys' Fees Incurred Due to Spire Vision's Baseless Removal

Spire Vision did not attempt to meet and confer with Walton, lead attorney, either before or after removal. Spire Vision did not agree to Balsam's demand to immediately stipulate to remand the Action. There were no objective grounds for removal in the first place. Spire Vision's purpose for removing to Federal Court was to delay the proceedings. The removal was frivolous; 28 U.S.C. § 1447(c) authorizes attorneys' fees and costs for a successful remand; and this is precisely the sort of situation that justifies the statute.

Wagner asks this Court to award him his costs, including attorneys' fees, to be paid jointly and severally against Spire Vision LLC and its attorneys Newman Du Wors. Wagner increases his request to \$7,275 (24.3 hours at \$250 per hour for Balsam and 3.0 hours at \$400 per hour for Walton) associated with remanding this Action to state court. Balsam Decl. at ¶ 19, Walton Decl. at ¶ 3.

IV. CONCLUSION

Any doubt as to whether federal jurisdiction exists is resolved *against* a finding of federal jurisdiction. *Kantor v. Wellesley Galleries Ltd.*, 704 F.2d 1088, 1092 (9th Cir. 1983). The removal statute is similarly strictly construed against federal jurisdiction. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). For the reasons set forth above, this Court should remand this Action to the Superior Court of California, County of Sonoma and order Spire Vision and its attorneys, jointly and severally, to pay Wagner's attorneys' fees incurred for remand in the amount of \$7,275.

THE LAW OFFICES OF DANIEL BALSAM

Dated: February 15, 2013

/s/ Daniel L. Balsam

Daniel L. Balsam

Attorney for Plaintiff Christopher Wagner

Box 145

POS-040

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Leeor Neta (State Bar 233454) Newman Du Wors 1201 Third Avenue, Suite 1600 Seattle, WA 98101 TELEPHONE NO.: (206) 274-2800 FAX NO. (Optional): (206) 274-2801 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Spire Vision LLC et al.		FOR COURT USE ONLY ENDORSED FILED SEP 09 2013 SUPERIOR COURT OF CALIFORNIA COUNTY OF SONOMA
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS: 3055 Cleveland Avenue MAILING ADDRESS: CITY AND ZIP CODE: Santa Rosa CA 95403 BRANCH NAME: Civil and Family Law Courthouse		
PLAINTIFF/PETITIONER: Wagner DEFENDANT/RESPONDENT Spire Vision LLC et al.		
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		CASE NUMBER: SCV-252580 JUDGE: Nancy Case Shaffer DEPT.: 18

(Do not use this proof of service to show service of a Summons and complaint.)

- At the time of service I was over 18 years of age and **not a party to this action.**
- My residence or business address is:
1201 Third Avenue, Suite 1600, Seattle, WA 98101
- ☐ The fax number or electronic notification address from which I served the documents is (complete if service was by fax or electronic service):

- On (date): September 9, 2013 I served the following **documents** (specify):

SUPPLEMENTAL DECLARATION OF LEEOR NETA REGARDING MEET AND CONFER
 CONFERENCE ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER OR FOR A STAY OF
 DISCOVERY AND IMPLEMENTATION OF A CASE MANAGEMENT ORDER

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

- I served the documents on the **person or persons** below, as follows:

- Name of person served: Daniel L. Balsam
- ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)

Business or residential address where person was served:

Law Offices of Daniel Balsam, 2912 Diamond Street #218, San Francisco, CA 94131

- ☐ (Complete if service was by fax or electronic service.)

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

- ☒ The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

- The documents were served by the following means (specify):

- ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

COPY By Fax

CASE NAME Wagner v. Spire Vision LLC	CASE NUMBER: SCV-252580
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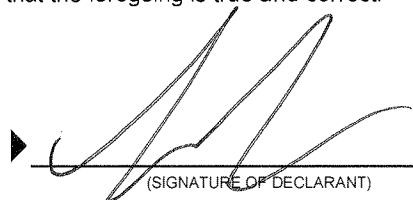
6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (*specify one*):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):
- c. ☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.*)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: September 9, 2013

Lindsey Rowson

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.


At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

 _____
(SIGNATURE OF DECLARANT)

SHORT TITLE: Wagner v. Spirevision LLC et al	CASE NUMBER: SCV-252580
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ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)

(This attachment is for use with form POS-040.)

NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

<u>Name of Person Served</u> <i>(If the person served is an attorney, the party or parties represented should also be stated.)</i>	<u>Where Served</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic service address, as applicable.)</i>	<u>Time of Service</u> <i>(Complete for service by fax transmission or electronic service.)</i>
Lifescrypt, Inc. Kevan Fornasero	Perkins Coie LLP 4 Embarcadero Center, Suite 2400 San Francisco, CA 94111	Time: _____
Christopher Wagner Timothy James Walton	Law Offices of Timothy Walton 9515 Soquel Drive, Suite 207 Aptos, CA 95003	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____

1 Timothy J. Walton (State Bar No. 184292)
 2 Jim C. Twu (State Bar No. 175032)
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 3 9515 Soquel Drive, Suite 207
 4 Aptos, CA 95003-4137
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 5 Fax: (650) 618-8687

6 Daniel L. Balsam (State Bar No. 260423)
 7 THE LAW OFFICES OF DANIEL BALSAM
 2912 Diamond Street #218
 8 San Francisco, CA 94131
 9 Phone: (415) 869-2873
 10 Fax: (415) 869-2873

11 Attorneys for Plaintiff Christopher Wagner

**ENDORSED
FILED**
SEP 12 2013

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA

Received

SEP 19 2013

NEWMAN | DUWORS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA (UNLIMITED JURISDICTION)

16 CHRISTOPHER WAGNER,

17 Plaintiff,

19 v.

20 SPIRE VISION LLC *et al*,

21 Defendants.

) Case No.: SCV-252580

)

) ~~[PROPOSED]~~ FIRST ORDER RE:

) DEFENDANTS' MOTION FOR

) PROTECTIVE ORDER OR, IN THE

) ALTERNATIVE, FOR A STAY OF

) DISCOVERY AND IMPLEMENTATION OF

) A CASE MANAGEMENT ORDER

)

) Date: August 21, 2013

) Time: 3:30 p.m.

) Judge: Hon. Nancy Case Shaffer

) Dept: 18

26 The "Motion for Protective Order Or, In the Alternative, For a Stay of Discovery and
 27 Implementation of a Case Management Order" filed jointly by Defendants Spire Vision LLC *et*
 28 *al* "Spire Vision" and Accelerize New Media Inc. ("Accelerize") came on regularly for hearing
 29 by the Court on August 21, 2013 in Department 18 of the Superior Court of Sonoma County.
 30 The Parties appeared through their counsel of record. Having considered the papers submitted
 31 and oral argument, the Court determined accordingly:

Defendants' Motion for Protective Order is denied as to the eight defendants who were served with only 23 form interrogatories. Good cause has not been shown as to why the eight parties served with 23 form interrogatories should be included in a protective order. The court concludes that the phrase used in the form interrogatories, "sending commercial emails to [Plaintiff]" is not vague. Nevertheless, this Court accepts Defendants' offer that each of those eight defendants (Achieve Opportunities, AgreeWizard, FurturesDrive, JunctionLights, Opportunity Central, Paths Direct, PullSmart, YourAdsHere) will respond to a set of form interrogatories (except for 17.1) ^(by D's choice) for each of the 49 commercial email advertisements at issue in this Action, for a total of $8 \times 22 \times 49 = 8,624$ interrogatories. Defendants shall respond within 30 days of ~~service of Notice of Entry of this Order.~~ *Delivery of emails on duplex*

With respect to the remaining ten parties and the respective production requests, special interrogatories, form interrogatories, and requests for admission, defendants either inadvertently failed to include exhibits 1-4 with the declaration of Leeor Neta in support of the protective order or they have been misplaced. These exhibits are required in order to rule on this issue. Defendants are ordered to resubmit the declaration of Leeor Neta, with exhibits, by August 28, 2013 and are further ordered to conform the declaration and exhibits to California Rule of Court, rule 3.1110. This matter is continued to September 11, 2013 for a ruling on the balance of the motion to compel.

Defendants' request for a stay, pending disposition of defendants' demurrer to complaint of Christopher Wagner, is moot, as this court has already ruled on that demurrer.

Defendants' request for a case management order and a discovery referee is denied without prejudice.

IT IS SO ORDERED.

Date: 9/12/13

By: *Nancy Case Shaffer*
HON. NANCY CASE SHAFFER

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, CA 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the foregoing attached papers in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: September 12, 2013


JOSÉ OCTAVIO GUILLÉN
COURT EXECUTIVE OFFICER

by 

Deputy Clerk

--ADDRESSEES--

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2912 DIAMOND ST # 218
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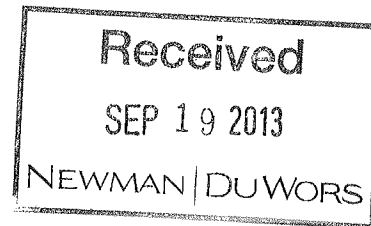
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**ENDORSED
 FILED
 SEP 12 2013**

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SONOMA

8 Daniel L. Balsam (State Bar No. 260423)
 9 THE LAW OFFICES OF DANIEL BALSAM
 10 2912 Diamond Street #218
 11 San Francisco, CA 94131
 12 Phone: (415) 869-2873
 13 Fax: (415) 869-2873



14 Attorneys for Plaintiff Christopher Wagner

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF SONOMA (UNLIMITED JURISDICTION)**

17 CHRISTOPHER WAGNER,	) Case No.:	SCV-252580
18 Plaintiff,)	
19 v.	) PROPOSED SECOND ORDER RE:	
	) DEFENDANTS' MOTION FOR	
	) PROTECTIVE ORDER []	
20 SPIRE VISION LLC <i>et al</i> ,)	
21 Defendants.	) Date:	September 11, 2013
	) Time:	3:30 p.m.
	) Judge:	Hon. Nancy Case Shaffer
	) Dept:	18

24 After a hearing on August 21, 2013 resolved part of the "Motion for Protective Order Or,
 25 In the Alternative, For a Stay of Discovery and Implementation of a Case Management Order"
 26 filed jointly by Defendants Spire Vision LLC *et al* "Spire Vision" and Accelerize New Media
 27 Inc. ("Accelerize"), the remainder of the Motion came on regularly for hearing by the Court on
 28 September 11, 2013 in Department 18 of the Superior Court of Sonoma County. The Parties
 29 appeared through their counsel of record. Having considered the papers submitted and oral
 30 argument, the Court determined accordingly:

Motion of defendants Accelerize New Media Inc., Achieve Opportunities, AgreeWizard, Digital Publishing Corporation, Furturesdrive, Junctionlights, Juniper Marketing, MediActivate LLC, On Demand Research LLC, Opportunity Central, Paths Direct, Prime Advertisers LLC, PullSmart, Serve Clicks LLC, Spire Vision LLC, Spire Vision Holdings Inc., Ward Media, Inc., XL Marketing Corporation and Youradshare for a protective order is DENIED as to the form interrogatories, ^{RFAs- Authentication} ~~requests for admission~~, and requests for production. These requests, taken separately or together, are not burdensome with respect to the individual defendant entities to which they are directed. Defendants shall respond within 30 ^{NR} days of ~~service of Notice of Entry of this Order~~ ^{From delivery of emails via Optix} ~~NR~~ ^{NR}

The court will continue the hearing in this matter to September 25, 2013, for ruling on the motion for protective order with respect to the special interrogatories. ^{and RFAs} The court will rule on the request to appoint a discovery referee in this matter at the continued hearing on ^{October 16} ~~September 25~~, 2013, after the court ^{and RFAs} has had an opportunity to review the 241 special interrogatories in more detail. The court will also consider whether to refer this matter to the court's discovery facilitator program.

The motion for a case management order is denied at this time, without prejudice. Although the relationships between the individual defendants appear to be somewhat complex, based on the information available to the court at this time, this does not appear to be complex litigation.

The request for a stay of discovery pending ruling on defendant's demurrer to the complaint is moot. The court overruled defendant's demurrer to the complaint on August 7, 2013.

IT IS SO ORDERED.

Date:

9/12/13

By:


HON. NANCY CASE SHAFFER

SCV-252580

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, CA 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the foregoing attached papers in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: September 12, 2013

JOSÉ OCTAVIO GUILLÉN
COURT EXECUTIVE OFFICER

by  _____

Deputy Clerk

--ADDRESSEES--

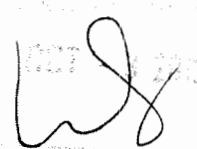
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✓
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CIV-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Daniel L. Balsam (State Bar No. 260423) THE LAW OFFICES OF DANIEL BALSAM 2912 Diamond Street #218 San Francisco, CA 94131 TELEPHONE NO. 415-869-2873 FAX NO. (Optional) 415-869-2873 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name) Plaintiff Christopher Wagner		FOR COURT USE ONLY 
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sonoma STREET ADDRESS 600 Administration Drive MAILING ADDRESS CITY AND ZIP CODE Santa Rosa, CA 95403 BRANCH NAME:		
PLAINTIFF/PETITIONER: Christopher Wagner DEFENDANT/RESPONDENT: Spire Vision LLC et al		CASE NUMBER SCV-252580
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Bus. & Prof. Code 17529.5, 17538.5		
A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -		

1. TO THE CLERK: Please **dismiss** this action as follows:

- a. (1) ☒ With prejudice (2) ☐ Without prejudice
- b. (1) ☒ Complaint (2) ☐ Petition
 (3) ☐ Cross-complaint filed by (name): on (date):
 (4) ☐ Cross-complaint filed by (name): on (date):
 (5) ☐ Entire action of all parties and all causes of action
 (6) ☒ Other (specify): * Only as to Defendant LIFESCRIPT INC., a Delaware corporation

2. (Complete in all cases except family law cases.)

- ☐ Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).

Date Oct. 2, 2013

Daniel L. Balsam

TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY:

If dismissal requested is of specified parties only or of specified causes of action only or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:

- ☒ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-Complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date

TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY:

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

Attorney or party without attorney for:

- ☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-Complainant

(To be completed by clerk)

4. ☒ Dismissal entered as requested on (date) OCT - 3 2013
 5. ☐ Dismissal entered on (date): as to only (name):
 6. ☐ Dismissal **not entered** as requested for the following reasons (specify):
 7. a. ☒ Attorney or party without attorney notified on (date) OCT - 3 2013
 b. ☐ Attorney or party without attorney not notified. Filing party failed to provide
☐ a copy to be conformed ☐ means to return conformed copy

Date:

OCT - 3 2013 Clerk, by

Kendra Felkins

Deputy

Page 1 of 2

REQUEST FOR DISMISSAL